Thomas A. Street

SELECTED CASES

ON THE

LAW OF

SURETYSHIP

AND

GUARANTY

BY

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PREFACE

The selection of the following cases on Suretyship and Guaranty is largely the result of the author's many years experience as a law school teacher. It has been thought best to confine the cases to those illustrating the general principles of the subject, rather than run the risk of confusion by entering too largely into detail or devoting too much space to exceptional cases.

The general doctrines of a subject are all that the student should be expected to master and he will do this the better by not attempting too much detail. Generally recent cases have been selected as more accurately reflecting the present state of the law. The object has been to present the American Law of Suretyship and Guaranty as it is now administered by our courts.

The very recent development of the business of indemnifying employers of labor, and guaranteeing credits and titles seemed to justify including those subjects here, although they might, with equal propriety, be treated under the title of insurance.

The hope of lessening the labors of those who teach, as well as those who study, a subject of growing importance in the courts and schools, furnished the motive for this volume.

HENRY H. WILSON.

LINCOLN, NEBRASKA, September 5, 1907.

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A

SELECTION OF CASES

ON THE

LAW OF SURETYSHIP

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CASES

ON

SURETYSHIP AND GUARANTY

CHAPTER I.

NATURE OF CONTRACT.

a. Contracts of Suretyship and Guaranty are conditional or absolute agreements to answer for the debt, default or miscarriage of another.

MERCHANTS' NAT. BANK. v. CITIZENS' STATE BANK. 1895.

93 Iowa 650; 61 N. W. Rep. 1065.

Appeal from district court, Pottawattamie county; A. B. Thornell, Judge.

Action at law on an alleged guaranty of a draft. At the conclusion of the evidence for the plaintiff, the court sustained a motion to direct the jury to return a verdict for the defendant. A verdict was returned as directed, and upon it a judgment in favor of the defendant for costs was rendered. The plaintiff appeals. Affirmed.

Robinson, J. In December, 1889, B. Arentz was engaged at Ocala, Fla., in the business of buying and selling oranges, and O. W. Butts was in the wholesale fruit and commission business in Council Bluffs, Iowa. Butts had ordered of Arentz a car load of oranges, which was shipped from Ocala to Council Bluffs, the bill of lading being taken in the name of Arentz. He drew a draft on Butts for $560, the price of the oranges, payable to the plaintiff, a banking association organized under acts of congress, and doing business at Ocala, Fla., at 30 days after sight. Before the plaintiff took the draft, it required a guaranty of payment by a bank in Council Bluffs. Arentz notified Butts of the demand, and he induced the cashier of the defendant, a corporation of this state, to sign and send to the plaintiff a

telegram, of which the following is a copy: "Council Bluffs, Iowa, Dec. 11, 1889. To Merchants' National Bank, Ocala, Fla.: Will guaranty Butts' draft for car oranges from B. Arentz. Citizens' State Bank. Chas. R. Hannan, Cashier." When the telegram was received, the plaintiff purchased the draft, taking the bill of lading, which was attached to it, and forwarded them for collection. The oranges arrived in Council Bluffs in bad order, and Butts refused to receive them, and refused to accept the draft. The defendant refused to pay the draft. Arentz is insolvent, and this action is brought against the bank on its guaranty. The answer of the defendant alleges that the guaranty was of the solvency and ability to pay of Butts; that the oranges were never delivered to him, and that he never accepted the draft, nor became a party to it; that the defendant is a corporation, and had no power to enter into a contract to guaranty the payment of a draft; and that there was no consideration for the guaranty. In a reply, the plaintiff alleged that it was usual and customary for the defendant and for banks, where it was doing business, to make such guaranties; that, at the time the one in question was made, an arrangement had been entered into between the defendant and Butts by which he was to hold the defendant harmless on the guaranty, and that it had money and other property in its possession which belonged to him, of a value exceeding its possible liability on the guaranty; that, by reason of these facts, the defendant is estopped to assert that the guaranty was executed without authority and without consideration. The appellant contends that the guaranty was authorized by the articles of incorporation of the defendant; that, if it was not, the plaintiff was a good-faith purchaser of the draft for value, and, as such, is entitled to protection, that, as the reply was not assailed, an estoppel must be regarded as sufficiently pleaded; that the court erred in excluding evidence which tended to prove an estoppel, and erred in taking the case from the jury.

The appellant may be right in its claim in regard to these matters, and not be entitled to recover in this action. If it be conceded that the guaranty was valid, the question which remains to be determined is whether it created any liability under the facts which the evidence tends to establish. As has been stated, the draft was for a car load of oranges, which was never received by Butts. The bill of lading was taken in the name

of the shipper, Arentz; was transferred to the plaintiff; and was pinned to the draft when it was presented to Butts for acceptance. This must have been done to secure the payment of the draft. There was never any actual or constructive delivery of the oranges to Butts. Forcheimer v. Stewart, 65 Iowa 596, 22 N. W. 886. They were worthless when they reached Council Bluffs. It was the duty of the consignor to deliver them in merchantable condition, and it cannot be claimed, under the evidence, that Butts was ever under any obligation to receive them. Therefore, he was not liable by reason of his refusal to accept the draft. The form of the undertaking of the defendant was that he would "guaranty Butts' draft for car load of oranges from B. Arentz." It was not to be a guaranty of Arentz' draft, nor of a draft drawn on Butts, and not accepted by him, but of one on which he was liable, drawn for a car of oranges. In view of the admitted facts in this case, the conclusion is irresistible that the defendant did not undertake to guaranty the payment of anything for which Mr. Butts should not be liable. Its liability was not intended to be extended beyond his, and the form of the guaranty was sufficient notice to the plaintiff of the fact. To "guaranty" is to promise "to answer for the payment of some debt or the performance of some duty in case of the failure of another person, who is, in the first instance, liable to such payment or performance." Bouv. Law Dict.; Manufacturing Co. v. Littler, 56 Iowa 603, 9 N. W. 905. Since Butts never became liable on the draft, the guaranty of the defendant has never become operative, and there can be no recovery on it.

There is no ground for claiming that the plaintiff was a good-faith purchaser of the draft for value. It knew when it received the draft that it had not been accepted, and that it had been drawn against a consignment of oranges which had not been delivered. It must be charged with knowing from the form of the guaranty that the defendant would not be liable unless Butts became responsible for the payment of the draft. Therefore, to show that the bank of Council Bluffs habitually gave guaranties like that in suit, and that the defendant was estopped to deny that it was a valid obligation, would have been without effect, and the plaintiff could not have been prejudiced by the refusal of the court to receive evidence to prove the estoppel pleaded.

Facts admitted or proven without conflict in the evidence showed that there was nothing upon which a verdict for the plaintiff could have been founded, and the district court did not err in directing a verdict for the defendant. Its judgment is

Affirmed.

AUCHANPAUGH v. SCHMIDT. 1886.

70 Iowa 642; 27 N. W. Rep. 805; 59 Am. Rep. 459.

Appeal from Buchanan circuit court.

Action upon a promissory note purporting to be executed as a joint note by one Charles Leipold, and the defendant. The note was executed in Illinois, where Leipold lived, and still lives. It became due May 23, 1871, and this action was commenced January 28, 1885. The defendant pleaded that he signed the note merely as surety; that under the law of Illinois the note became barred as against Leipold by the statute of limitations; and that, being barred as against Leipold, the principal, it was barred as against his surety, the defendant. There was a trial to a jury, and a peremptory instruction was given to find for the plaintiff. Verdict and judgment were rendered accordingly, and the defendant appeals.

ADAMS, J. The note was executed to one Schneider, the plaintiff's intestate. The fact that the note was signed by the defendant as surety was proven only by the defendant's wife. An objection was raised to her testimony on the ground that she was an incompetent witness to prove such fact as against an administrator. The court overruled the objection, and the evidence was admitted, and no question is now raised as to the correctness of that ruling. If we should be of the opinion that she was incompetent, and that there was no proper evidence that the defendant's relation to the note was that of surety, we could not affirm upon that ground, because we do not know that the defendant might not have introduced other evidence upon that point if his wife's testimony had been excluded.

We come, then, to the question raised by the answer and the admitted evidence of suretyship, and that is as to whether a claim which is barred by the statute of limitations, as against the principal debtor, is by reason thereof barred also as against

a surety. In answer to this question, we have to say that we think that it is. No authority has been cited upon either side which is directly in point. Ordinarily, we may presume that, where the statute has fully run as against the principal, it would happen that it had fully run as against the surety. But the case before us has this peculiarity: The defendant, when the note was executed, resided in Illinois. Before the note was barred by the statute of that state he removed to Iowa, and before the statute of this state had fully run the action was commenced. If, then, the defendant were a principal debtor, the note would not be barred as against him, however it might be as against Leipold. He must therefore rely solely upon the fact that he is surety upon the note, and upon the bar as against Leipold. Such being the case, it is perhaps not surprising that no authority should be cited that is precisely in point. It becomes our duty, therefore, to attempt to determine the case on principle. It would not be denied that a surety upon a note may set up any meritorious defense which the principal, if sued, might set up in his own behalf. Now, when the statute of limitations has run as against the principal, the law excuses him from setting up any meritorious defense which he may have, and allows him to rely upon the technical defense of the statute alone. The theory is that he was not under obligations to preserve the evidence of his meritorious defense if he had any, and so the court will not inquire whether he had such defense or not. The statute has been very properly denominated the statute of repose. As the surety is allowed to set up any meritorious defense which the principal might have set up, we are not able to see why he should be required to preserve the evidence of such defense after the principal was not bound to do so. Again, when a surety pays a debt, it is his right to look to the principal for reimbursement. But a surety paying a debt after it had become barred as against the principal, would be remediless. Now, we do not think that a creditor, by his own dilatoriness, should be allowed to put the surety in such position. It is not a full answer to say that a surety might have protected himself. It may be conceded that he might. But, practically, sureties often overlook their obligations if their attention is not called to them, and we do not think that the just protection of the rights of the creditor requires that we should

hold so strict a rule against them as that for which the plaintiff contends.

It is said, however, that the defendant, if he is allowed to plead the bar of the statute at all as against the principal, should have averred and shown that no judgment in fact had been rendered against the principal. But we think that we would be justified in assuming, from the plea made, that judgment had not been rendered until it was averred and shown by the plaintiff to the contrary.

Reversed.

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b. A contract of suretyship creates an immediate and direct liability, and is usually entered into either jointly or jointly and severally with the principal debtor, and is supported by the same consideration that supports the contract of principal and principal and surety may be sued jointly.

READ v. CUTTS. 1831.

7 Greenleaf (Maine) 186; 22 Am. Dec. 184.

Assumpsit on an agreement in writing, signed by the defendant, dated January 14, 1825, as follows: "Whereas, Tristram Hooper, of Saco, has given his several notes of hand to James Read and Company, of Boston, one dated November 25, 1824, for six hundred and eighty-nine dollars and eleven cents, and the other dated November 26, 1824, for one thousand one hundred and six dollars and sixty-four cents; and whereas, said Tristram has conveyed to me by his deed of this date a lot of land in said Saco, being number," etc. "Now, for the consideration above, and in consideration that the said James Read and Company have promised to and will forbear to sue said Tristram on said notes of hand for and during the term of twelve months from the date hereof, I promise to pay the said Read and Company the sum of thirteen hundred dollars at that time, unless the same shall have been paid by said Hooper." At the trial it appeared that Hooper continued in business at Saco, having a stock of goods liable to attachment of the value of two thousand dollars, from the date of the said notes till his

death in November, 1826. Hooper's estate being insolvent, plaintiffs received a dividend therefrom of four hundred and forty-four dollars and thirty-nine cents, being the pro rata they were entitled to upon the two notes mentioned in the agreement, and a third note of two hundred and twenty-nine dollars and twelve cents. The dividend was received by plaintiff, under an agreement with defendant, that the rights of neither should be affected thereby. In the summer of 1825, seven hundred dollars were paid on the largest of the two notes mentioned in defendant's agreement. In June, of the same year, the defendant allowed the land conveyed to him by Tristram to be sold and the proceeds to be paid to Hooper. No notice of the non-payment of the two notes was ever given to the defendant, nor demand made on him until after the commencement of this action; nor did it appear that plaintiff had ever taken any measure to enforce payment from Hooper. Whether the action could be maintained was submitted to the court.

By Court, MELLEN, C. J. Strictly speaking, guarantors, indorsers, and co-obligors, or co-promisors are all sureties for others, who are the principals; but still, in common parlance, the word surety is used, in a more limited sense, to mean a co-obligor or co-promisor, entering into a contract with the principal jointly, or jointly and severally, and at the same time. He may, in all cases, be sued jointly with the principal. No demand of the debt, or notice of its non-payment by the principal, need be proved in an action against such surety, in any case. But the contract of a guarantor is entered into by him before or after that of the principal, generally, and has, in terms, a special reference thereto. His contract always being of this peculiar character, he must always be sued separately, and in many cases he can not be made chargeable unless a seasonable demand of payment be made on the principal, and notice of non-payment given to the guarantor, where a pre-existing debt is the subject of the guaranty.

In support of the above positions, the following cases may be cited: Hunt v. Adams, 5 Mass. 358 (4 Am. Dec. 68); Carver v. Warren, Id. 545; Moies v. Bird, 11 Id. 436 (6 Am. Dec. 179); White v. Howland, 9 Id. 314 (6 Am. Dec. 71); Upham v. Prince, 12 Id. 14; Oxford Bank v. Haynes, 8 Pick. 423 (19 Am. Dec. 334); Sage v. Wilcox, 6 Conn. 81; Phillips v. Astling, 2 Taunt. 206; Warrington v. Furbor, 8 East, 242; Swinyard v. Bowes, 5

Mau. & Sel. 62; Cannon v. Gibbs, 9 Serg. & R. 202. Another distinction between a surety and a guarantor is that a promise of a surety is supported by the consideration on which the promise of the principal is founded, and no other need be proved; but the engagement of a guarantor must be founded on some new or independent consideration, except in those cases where the guaranty is given at the time the debt is contracted by the principal, and so may be considered as connected with it. In support of the above principle in relation to a guarantor are the cases of Leonard v. Vredenburgh, 8 Johns. 29 (5 Am. Dec. 317); D'Wolf v. Rabaud, 1 Pet. 476; Bailey v. Freeman, 11 Johns. 221 (6 Am. Dec. 371); Hunt v. Adams, and Sage v. Wilcox, cited before; 3 Kent Com. 86, 87; Oxford Bank v. Haynes (19 Am. Dec. 334), before cited; and Packard v. Richardson, 17 Mass. 122 (9 Am. Dec. 123).

With respect to the question of demand and notice, in order to charge a guarantor of the payment of a pre-existing debt, there seems to be less certainty than might have reasonably been expected, considering the importance of the subject, especially in the commercial community. In the before-mentioned cases of Warrington v. Furbor, Phillips v. Astling, Cannon v. Gibbs, Sage v. Wilcox, and Oxford Bank v. Haynes, and some others, demand and notice were decided to be necessary, unless in case of the insolvency of the principal. In Redhead v. Carter, Goring v. Edwards, Allen v. Brightmore, 20 Johns. 365,[1] Williams v. Granger, Cobb v. Little, and some others, such demand and notice were decided not to be necessary. It is important to ascertain the true grounds of these apparently opposing decisions; and we apprehend that the principle on which they rest, when carefully examined, will explain their seeming contradictions and show their consistency. The essence of the engagement of a guarantor of the character we are considering, we apprehend, is that the debt shall be paid, if the creditor shall take the usual and legal steps to secure it, or render the principal's liability absolute. In Warrington v. Furbor, Phillips v. Astling, Cannon v. Gibbs, and Oxford Bank v. Haynes, the guaranty was that certain debts arising on bills of exchange or promissory notes, but which were not then payable, should be duly honored and paid. The case of Bank of New York v. Livingston,

1—Allen v. Rightmere, 20 Johns. 365 (11 Am. Dec. 288).

2 Johns. Cas. 409; Cumpston v. McNair, 1 Wend. 457, are of the same character, and demand and notice were held necessary.

In the case of Sage v. Wilcox it does not appear when the note, the payment of which was guaranteed, was made payable; besides, in addition to the want of notice in due season, the court, in their opinion, say the promise alleged was absolute, but that which was proved was conditional. It is true that want of demand and of seasonable notice was one ground of the decision; but when we take into consideration the terms of guaranty, viz., "I hereby guaranty the payment of the within note one year from this date, whether a suit is brought against the signer, Jacob Wilcox, or not," it seems somewhat singular that the court considered a demand on the signer as essential. The decision is at variance with Williams v. Granger, and several other important cases, among which is that of Allen v. Rightmere, above cited. In most of the other cases before named, where demand and notice were held necessary, the plaintiff had not taken the legal steps to charge the principal debtor and obtain the money, and the omission so to do was not excused on account of insolvency. In all these and similar cases it is evident that certain measures are to be pursued by the creditor to give effect to the guaranty, cases of insolvency excepted. But when the debt, which is the subject of the guaranty, has become due and payable, and absolute before the guaranty is given, the creditor has nothing to do to perfect his legal claim on the principal, it has become perfect, and the guarantor must be deemed conusant of that fact; and when a creditor's rights upon a bill of exchange or an indorsed note have become absolute as against all parties chargeable upon it, or when, from the absolute character of the debt guaranteed, nothing of a preliminary nature on the part of the creditor is by law required to perfect his rights, why should demand and notice be essential to entitle him to maintain his action against the guarantor? We apprehend that upon examination it will be found that the cases cited, as well as others, in which demand and notice have been held to be unnecessary, were decided upon the foregoing distinction. In Cobb v. Little, Crague's note was dated April 30, 1817, payable in six months, and on the back of the note the defendant wrote these words: "I guaranty the payment of the within note in six months. Thomas Little. June 3, 1817." Here the guaranty was absolute, extending Little's term of pay-

ment beyond the six months named in the body of the note; and nothing was by law required to be done by Cobb to perfect his claim against Crague. The court held that a demand on Crague, and notice to Little, were not necessary. The court proceeded on the same principle in Breed v. Hillhouse, 7 Conn. 523, in which the payee of a promissory note, after it became due, received a guaranty of a third person in these words: "I hereby guaranty the payment of this note within four years." The court held it an absolute guaranty, and that demand and notice were unnecessary. Here the note being due at the time of the guaranty, nothing was required to be done to perfect the payee's rights against the promisor. So in the case of Norton v. Eastman, 4 Greenl. 421,[1] the court say: "If A holds a note against B for one hundred dollars, payable in one year, and C guaranties the payment of it when due, in such a case, notice is superfluous." So in Allen v. Rightmere, before cited, the court decided that no demand and notice were necessary, considering the promise of the guarantor as absolute that the maker of the note should pay it, or that he himself would. In Boyd v. Cleveland, 4 Pick. 525, the defendant, an indorser, declared to the plaintiffs, who had no confidence in the other parties to the note, that he should be in New York when the note would become due, and would take it up, if not paid by any other party to it; and the court held that the plaintiffs were not bound to give notice of the non-payment by the maker, as in those cases where an implied promise is relied on. In Redhead v. Carter no notice was given, but the cause was decided on another ground, namely, that the undertaking or engagement was absolute, and so no notice was necessary. It was a case of nisi prius, and the promise of the defendant seems to have been considered as an independent and original contract on his part.

The case of Jones v. Cooper, Cowp. 228, was different from the present; it merely presented the question whether the defendant's promise was a collateral one, and so was within the statute of frauds. And Adney's case also was one of a collateral and contingent nature, and so not provable before commissioners of bankruptcy.

In the case at bar it appears that Hooper, on the twenty-fifth of November, 1824, gave his promissory note to the plaintiffs

1—4 Greenl. 521.

for six hundred and eighty-nine dollars and eleven cents, and on the next day gave them another note for one thousand one hundred and six dollars and sixty-four cents, both payable on demand; and that the defendant, on the fourteenth day of January, 1825, signed the agreement, on which the present action is founded; and he states that in consideration of a conveyance of a tract of land to him by Hooper, and of the plaintiffs' promise to forbear to sue Hooper on said notes of hand, for and during the term of twelve months from the date of his contract, and of their actual forbearance during that term, he would pay the plaintiffs the sum of one thousand three hundred dollars at the end of said twelve months, unless the same should then have been paid by said Hooper. The consideration of this promise is a legal one; and no question is made as to its sufficiency. No demand was made on Hooper at the end of the twelve months, though for many months after that time he remained solvent and amply able to pay the notes. And it is not denied that the plaintiffs did forbear to sue Hooper during the twelve months. On these facts it is contended that this action is not maintainable, on account of the omission to demand payment of Hooper at the end of the term of credit to the defendant, and to give notice of non-payment by him; and also on account of the laches of the plaintiffs in not collecting the money of Hooper in his lifetime. With respect to this latter objection, we would observe that it has been repeatedly decided that mere delay to pursue the principal and collect the money of him, does not discharge a surety or guarantor, provided such delay be unaccompanied by fraud, or an agreement not to prosecute the principal, made without the assent of such surety: Lock v. United States, 3 Mason 446; Hunt v. Bridgham, 2 Pick. 583 (13 Am. Dec. 458); United States v. Kirkpatrick, 9 Wheat. 724; Kennebec Bank v. Tuckerman, 5 Greenl. 130 (17 Am. Dec. 209). As to the objection that no demand was made on Hooper, or notice of non-payment given to the defendant, the cases before cited as applicable to such a guaranty as the present, furnish an answer. The liability of Hooper on his notes to the plaintiff was an absolute one at the time he signed the guaranty; they had then a perfect right of action upon them against Hooper, without any demand upon him. The defendant did not employ the language made use of in the case of Sage v. Wilcox, "I guaranty the payment of the note"; but it is : "I promise to

pay the sum of one thousand three hundred dollars at that time," the end of twelve months, "unless the same shall have been paid by said Hooper." If the defendant at that time had called on the plaintiffs to pay the notes according to his promise, he would have learned that they had not been paid, and that he must pay them. Nothing being necessary to be done on the part of the plaintiffs to perfect their rights as against Hooper, this case does not come within the principle of the decisions before mentioned, in which demand and notice were held necessary. The plaintiffs knew that Cutts had received a conveyance of a tract of land from Hooper by way of indemnity against loss in consequence of the guaranty; and the land thus conveyed was stated at the argument to be worth one thousand three hundred dollars or more; and this fact was not denied. This very circumstance naturally lulled the attention of the plaintiffs, and led them to the conclusion that the defendant would promptly fulfill his engagement, attend to his own interest, and take notice of those facts which might seriously affect it. Instead of all which, within less than six months after giving the guaranty, he conveyed the land, and permitted Hooper to receive the avails of it. He has thus voluntarily given up his indemnity, and has placed himself in his present situation; and there is no one but himself on whom to cast any blame. There is no proof that the defendant ever informed the plaintiffs of the above fact until after the commencement of the present action.

As to the question of damages, we are of opinion that the defendant is answerable to the extent of one thousand three hundred dollars, and interest thereon from January 14, 1826, unless the payments which have been made by Hooper have reduced the sum now actually due below the amount. It does not appear that those payments were specially directed to be applied in part discharge of the defendant's liability; and such being the case, the plaintiffs had the right to make the appropriation, and consider the sums paid as going to extinguish, pro tanto, the portion of the two notes not collaterally secured by the guaranty of the defendant: Brewer v. Knapp et al., 1 Pick. 332.

According to the agreement of the parties, a default must be entered.

WEIKLE v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO. 1896.

64 Minn. 296; 66 N. W. Rep. 963.

Appeal from municipal court of Minneapolis; Andrew Holt, Judge.

Action by T. K. Weikle against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

BUCK, J. The defendant is a railroad corporation, operating a line of railway through Glenwood and Elbow Lake, in this state, and to Hankinson, in the state of North Dakota; and, at the times mentioned in the complaint, F. D. Underwood was the general manager, and W. L. Martin the general freight agent, of this railroad corporation, its business being that of a common carrier. On December 1, 1894, the plaintiff was the owner of 98 hogs, the value of $493, part of said hogs being at Glenwood, and the others at Elbow Lake, Minn., which were stations on the line of defendant's railway. Prior to the date above named, the defendant's general manager, Underwood, and general freight agent, Martin, ascertained that the plaintiff was willing to dispose of said hogs for the price of 5 cents per pound for part of said hogs, and for 5½ cents per pound for the others; and they requested him to ship said hogs to one R. H. Hankinson, at Hankinson, N. D., and informed him that, if he would do so, the defendant railroad corporation would guaranty the payment to plaintiff of the price of said hogs. Accordingly, plaintiff shipped said hogs to Hankinson, N. D., and delivered them to R. H. Hankinson, who was unwilling or unable to pay the price for them, or any part thereof, and so informed the plaintiff. Thereafter, and in the month of December, 1894, Underwood and Martin, without plaintiff's knowledge or consent, caused said hogs to be shipped from Hankinson to Minneapolis, in this state, and demanded of plaintiff that he should receive and accept said hogs at Minneapolis, which plaintiff refused to do, and he demanded payment of defendant of the price of the hogs, no part of which has ever been paid.

Fairly construed, we think that the complaint and findings of the trial court do not show a purchase of the hogs by the defendant, but that they were sent to Hankinson in the expectation that he would purchase and pay for them, and that, if he did

not do so, then the manager and freight agent assured the plaintiff that the defendant would guaranty such payment. Certainly in such case the defendant was not the principal or original purchaser or debtor. The fact that the general manager and freight agent assured plaintiff that defendant would guaranty the payment excludes the proposition that it was an original undertaking, as a purchase, on the part of the defendant. In the case of Dole v. Young, 24 Pick. 250, the following writing was signed and addressed to the plaintiff by the defendant: "Please send W. goods to the amount of $100, and I will guaranty the same in four months." And the plaintiff, immediately after the presentation thereof, delivered the goods to W. It was held (Chief Justice SHAW delivering the opinion) that it was strictly a guaranty of the debt of W., and not an original undertaking of the defendant. It does not appear that there was a completed sale to any one. Hankinson did not agree to buy or pay for the hogs, and he not only refused to pay for them, but did not keep them. The defendant, not having bought them or paid for them, did not seek to keep them, and without making any charges for transporting them to North Dakota, shipped them back to Minneapolis, where it offered to deliver them to plaintiff, who refused to receive them. Whether the hogs at Minneapolis were worth more or less than the previously agreed price of $493, or whether they would have been worth less than that amount if delivered at Glenwood and Elbow Lake, does not appear, and perhaps in this particular and in this action it is not essential. We merely refer to it for the purpose of showing that it does not affirmatively appear that the plaintiff was damaged by the act of the defendant in shipping the hogs either way, or leaving them at Minneapolis.

The appellant's counsel suggests that a railroad corporation has implied authority to do all acts necessary for the full and complete utilization of its special powers which are not impliedly excluded by the terms of its grant, and cites the case of State Board of Agriculture v. Citizens' St. Ry. Co., 47 Ind. 407, in support of this position. The facts in that case are materially different from those appearing in this action. In that case the street-railway company had received the benefits, profits, and advantages of the contract made with it, and these profits had gone to swell the dividends of the stockholders of the corporation, and the court held it liable. The street-railway company

had subscribed $1,000, and promised to pay the same to the state board of agriculture, as an inducement for it to hold a fair for three successive years north of the city of Indianapolis, whereby the street-railway company would be greatly benefited in carrying passengers. After receiving the benefits resulting from the holding of such fair, it refused to pay its subscription, and the court held it liable. This decision is criticised by Wood, R. R. 552, citing Davis v. Railroad Co., 131 Mass. 258, as holding a diametrically opposite doctrine. We express no opinion as to which of the cases states the correct doctrine, there being no express or implied contract of purchase between plaintiff and defendant, and the latter, not having received any of the profits or benefits of the transaction, is not primarily liable to pay the price of the hogs. Is it liable upon the guaranty of its general manager and general freight agent that if Hankinson, a third party, not shown to have any business connection with the defendant, should not pay the price of the hogs, then the defendant would guaranty the payment of the price thereof to the plaintiff? We are of the opinion that it is not so liable. There was no express authority from the corporation that the manager or agent might make such a guaranty, and there could not be any implied power, because giving such guaranty was beyond the apparent scope of their authority. "A party dealing with a corporation is chargeable with notice of the nature and extent of its powers, as declared by its charter or articles of association." Kraniger v. Building Soc. (Minn.), 61 N. W. 904.

There has not been any recognition or ratification of the acts of the general manager and general freight agent by the corporation, and, whatever may be the liability of the manager and agent on account of the part which they took in the transaction, the defendant is not liable. *Judgment affirmed.*

CAMPBELL v. SHERMAN. 1892.

151 Pa. St. 70; 31 Am. St. Rep. 735; 25 Atl. Rep. 35.

McCollum, J. On the 1st of January, 1887, J. A. Homet, the appellant, bought of Adam Sherman two judgments against A. R. Robbins, on which there was then an unpaid balance of $592.38, and they were duly assigned to him. At the same time

he loaned to Sherman $266.62. To secure the payment of the judgments and the money loaned, he received the bond of Sherman in the sum of $859, on which, by virtue of the warrant of attorney contained therein, judgment was entered January 3, 1887. On a distribution of the proceeds of a sale by the sheriff on the 13th of September, 1890, of the real estate of Sherman, the appellant claimed to apply on his judgment the fund remaining after paying costs and prior liens. The subsequent lien creditors of Sherman admitted that the appellant was entitled to receive the sum loaned, with interest thereon, but contended that Sherman was released from liability as to the balance, because of the appellant's failure to revive the Robbins judgments. To this the appellant answered that his omission to revive these judgments did not release Sherman, and that if it did the creditors could not take advantage of it on distribution. The conclusion reached by the learned auditor was, that he could not, at the instance of the lien creditors, set aside or disregard the judgment on the showing before him, but that Sherman might, in an appropriate proceeding, rely on the appellant's negligence as a defense to it. The learned president of the common pleas thought that this defense could be successfully made before the auditor by the lien creditors, and the fund was accordingly awarded to them.

In reviewing the decision of the court below, the first important inquiry is, whether the obligation of Sherman in respect to the Robbins judgments was that of a surety or of a guarantor. If he was a surety, he was not released from liability by the negligence of the appellant, and the contention concerning the powers of the auditor has nothing to rest upon. It is well settled that mere forbearance, however prejudicial to a surety, will not discharge him, and that the failure of a creditor to revive a judgment does not release the surety, unless there was an express agreement that it should be kept revived for his benefit: Winton v. Little, 94 Pa. St. 64; United States v. Simpson, 3 Penr. & W. 437; 24 Am. Dec. 331. We think the undertaking of Sherman was that of a surety. His bond included the money loaned and the balance due on the Robbins judgments, and by its express terms was to remain in force until the whole sum was paid. The written conditions in the bond define the liability of the obligor, and we cannot add to them, by implication, a condition which would render them nugatory. The written condition

applicable to this contention is, that if the judgments "shall be paid in full by the said A. R. Robbins, his heirs and assigns, to the said J. A. Homet, then this obligation to be void, otherwise to be and remain in full force and virtue." The appellant purchased the judgments on the agreement of his vendor to pay them if Robbins did not. It was a contract of suretyship, and not of technical guaranty, on which he parted with his money. On the failure of Robbins to pay the judgments at maturity, he was at liberty to proceed directly against the surety. He was not bound to resort to legal proceedings against Robbins, or to show that they would have been unavailing, in order to sustain process upon the bond. He was under no legal duty to the surety to revive the judgments, unless requested to do so; and as no such request was made, negligence in this particular cannot be imputed to him.

The law on this subject is stated by AGNEW, J., in Reigart v. White, 52 Pa. St. 440, as follows: "A contract of suretyship is a direct liability to the creditor for the act to be performed by the debtor, and a guaranty is a liability only for his ability to perform this act. In the former the surety assumes to perform the contract of the principal debtor if he should not; and in the latter the guarantor undertakes that his principal can perform,—that he is able so to do. From the nature of the former, the undertaking is immediate and direct that the act shall be done, which, if not done, makes the surety responsible at once; but from the nature of the latter, non-ability—in other words, insolvency—must be shown." In Kramph's Ex'x v. Hatz's Ex'rs, 52 Pa. St. 525, WOODWARD, C. J., discussing the same subject, said: "The contract of a guarantor is to be carefully distinguished from that of a surety; for whilst both are accessory contracts, and that of a surety in some sense conditional, as that of a guarantor is strictly so, yet mere delay to sue the principal debtor does not discharge a surety. The surety must demand proceedings, with notice that he will not continue bound unless they are instituted: Cope v. Smith, 8 Serg. & R. 110; 11 Am. Dec. 582. By his contract he undertakes to pay if the debtor do not,—the guarantor undertakes to pay if the debtor cannot. The one is an insurer of the debt; the other an insurer of the solvency of the debtor. It results, as a matter of course, out of the latter contract, that the creditor shall use due diligence to make the debtor pay; and failing in this, he lets go the guar-

antor." The foregoing extracts from the opinions of eminent Pennsylvania jurists draw with remarkable clearness and precision the distinction between a contract of suretyship and a contract of guaranty, and accurately define the respective rights and obligations of a surety and a guarantor. There has been no departure by this court from the principles announced in them, and they sustain the contention of the appellant that his omission to revive the Robbins judgments did not affect Sherman's liability on his bond. It follows that it was error to award the fund to the subsequent lien creditors.

Decree reversed, and record remitted to the court below, with direction to distribute the fund in accordance with this opinion. The costs of this appeal to be paid by the appellees.

THE PENNSYLVANIA COAL CO. v. BLAKE. 1881.

85 N. Y. 226.

Appeal from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made April 1, 1879, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

Folger, Ch. J. The first point made by the appellant is, that the mortgage given by her was without consideration and is void.

It is so, that the appellant took no money consideration, nor any strictly personal benefit, for the giving of the mortgage by her. It was made for the benefit of others than her, entirely as a security for debts owing by them, and to procure for them further credit and favor in business. In other words, the lands of the appellant became the surety for the liabilities of the business firm of which her husband was a member. It is so, also, that the contract of surety needs a consideration to sustain it, as well as any other contract. (Bailey v. Freeman, 4 Johns. 280; Leonard v. Vredenburgh, 8 id. 29.) But that need not be something passing from the creditor to the surety. Benefit to the principal debtor, or harm or inconvenience to the creditor, is enough to form a consideration for the guaranty; and the consideration in that shape may be executory as well as executed at

the time. (McNaught v. McClaughry, 42 N. Y. 22; 8 Johns., *supra.*) Now, here was an agreement by the plaintiff to extend the payment of part of the debt owing by the principal debtor for a definite time, if the debtor would procure the mortgage of the appellant as a security for the ultimate payment of the amount of the debt thus extended. (Sage v. Wilcox, 6 Conn. 81; Breed v. Hillhouse, 7 Id. 523.) Though the actual execution of the mortgage by the appellant was on a day subsequent to that of the agreement between the creditor and the principal debtors, and subsequent to the dates of the extension notes, the mortgage and the notes were made in pursuance of that agreement, in consideration of it and to carry it out. The findings are full and exact on this point, and are sustained by the testimony. There is no proof that the actual delivery of the notes and mortgage was not contemporaneous; though the dates of the notes and the mortgage and the entry of credit in the books of the plaintiff do not correspond. All was done in pursuance of one agreement, and the plaintiff was not bound to forbearance until the mortgage was delivered. It was not until then that the agreement to forbear was fixed and the consideration of benefit to the principals was had. It was not, therefore, a past consideration.

It is not necessary to consider whether the appellant is not estopped by the agreement of February 25, 1876, from setting up a want of consideration.

The second point made by the appellant is that one of the notes given on the extension was paid by the principals, and that the land is, by so much as the amount of that note, relieved from the lien of the mortgage. The difficulty in upholding this position is in the facts. Doubtless it was the purpose of the principals, when they went to the creditor with the checks, that the note should be paid. They never made the positive offer of them to the plaintiff to that end, in such way as that the plaintiff must take them for that explicit purpose or reject them. If the principals had insisted that the checks should be applied in payment of the notes, they would have been; but upon being given their option to have them thus applied and their credit on open account stopped, or applied on open account and their credit thereon continued, they preferred the latter. The creditor recognized the right of the debtors to apply where they chose, and but exercised its right to urge and convince to a different application. The appellant, as surety, cannot take any advan-

tage from what passed, for there was never an application to the notes insisted upon by the principals, or made in fact, or more than spoken of, and there was acquiescence by each of the principals in the course that was taken. The checks were not received as a payment; they were not left as a payment; they were left in abeyance, their ultimate application or return to be determined after further consideration. Moreover, by the subsequent agreement, made by the appellant, the note is treated as unpaid, and enters into, and the subject-matter thereof is part of, the joint debt of the principals, assumed by the appellant's husband, guaranteed by her and for the payment of which she pledged her separate estate. This agreement was made on good consideration, expressed in the instrument, and unless the agreements of parties who are married women are to be nothing more substantial than summer winds, she is estopped thereby.

The third point is that there should not have been a personal judgment against the appellant. The judgment is based upon the guaranty contained in what we have called the subsequent agreement, and which contains the individual and personal guaranty by the appellant of the payment of a sum named, upon demand therefor made by Clarence A. Blake, and his refusal or neglect to pay. It is averred in the complaint that a demand was made upon Clarence A. Blake. There is a general denial in the answer of the allegations of the complaint, save those that state the execution of the mortgage and the agreement. There is no finding that a demand was made. There is no request to find that there was not a demand. There is no proof that there was a demand in fact made. Demand and notice are often duties of imperfect obligation, and may in such case be omitted, if the facts are such that no benefit can result from the making of them (Hickling v. Hardey, 7 Taunt. 313); but then he who should have made the demand must show the inutility of them, and that was not done here. The appellant is a surety, and demand of the principal is a part of the contract (Nelson v. Bostwick, 5 Hill 27); it is one of the conditions precedent to her obligation to pay. If this position had been taken or relied upon at the trial, we should feel obliged to maintain it here. There is nothing in the case to show that it was suggested or thought of at the trial, where the plaintiff might have shown a demand made, or the utter inutility of one. The denial in the answer is not one that would positively indicate a purpose to

make the matter of a demand one of the contested issues on the trial, though it would have been enough on which to take the position there. It does not appear that the point was made at General Term; rather, from a perusal of the opinion there delivered, we should gather that the position taken was not that there had been no ground for personal liability established, but that the decision of the trial court had made the personal liability absolute and not contingent upon a deficiency arising upon a sale of the lands, a position which is met by the General Term in its observation that though such is the decision, the judgment is as the appellant would have it, in that respect. On the whole we think that the case shows no error in this particular calling for a reversal or even a modification.

The fourth point is, that if there was no payment of the first note that fell due, then there was an extension of time given to the principals, that discharged the lands. This is claimed to grow out of the application of money on open account instead of on the note. It is said that the note not having been paid, the time of payment of it was by that act or omission extended. The test is, could the surety have paid the note, and enforced the consequent liability against the makers?

There was no valid agreement between them and the payee for an extension, which either could have maintained against the other. The payee could not, on the ground of a valid extension, have lawfully refused the offer of the surety to pay the note; nor could the makers on that ground have lawfully resisted the claim of the surety for the amount, had it been paid. Besides, upon this point as well as upon others in the case, the subsequent acts and agreements of the appellant estop her from setting up such facts against a recovery.

It follows that the judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

McNAUGHT v. McCLAUGHRY. 1870.

42 N. Y. 22; 1 Am. Rep. 487.

Appeal from judgment of supreme court, general term, affirming judgment of referee.

The action was on a promissory note made by one Abram McClaughry, and signed as surety by the defendant's testator. The facts sufficiently appear in the opinion.

Hunt, J. The case presents but a single question. Abram McClaughry borrows money, or makes a purchase, of the plaintiff, for which he gives him his note for $300, with interest. No time of payment is specified. At the time of making and delivering the note, Abram promised and agreed with the plaintiff, that he would procure his father to sign the note as surety, if at any time the plaintiff should desire it, or should deem himself insecure. The plaintiff accepted the note upon this agreement. In a few months the plaintiff desired the additional security, and Abram procured his father to sign the note for the accommodation of him, Abram, and redelivered it to the plaintiff. No new consideration then passed between the parties or to the father.

I cannot doubt that the defendant is liable in this action. Both principle and authority concur in this result. The note was past due when the holder became dissatisfied with his security. He informs the maker that he is not satisfied. Two courses were open to the latter, to pay the note or to give the holder additional security. He adopts the last alternative. He procures his father to put his name upon the note, and, in the language of the judge, "redelivered" to the plaintiff the note thus signed. I am not able to see why this is not a new agreement upon a present and valid consideration, and obligatory upon all parties.

The case was argued, however, chiefly upon the second ground, to wit: That at the time of obtaining the money or property, and as a portion of the bargain by which the plaintiff accepted the note, the maker agreed to obtain the name of his father upon the same, whenever desired by the plaintiff, and that the signature was given in performance of that agreement. This position is sound also. Suretyship upon promissory notes may be made in various forms, as by becoming an undersigner, an indorser, or formal guarantor. In every form the existence of a

sufficient consideration between the maker and the lender establishes a sufficient consideration, also, as against the surety. In practice there is usually no communication between the lender and the surety. The business is transacted between the principals alone. A borrower applies at a bank for a loan, offering to furnish the name of his friend as security, or presents, in the first instance, a note so indorsed. It is neither customary nor necessary for the bank to investigate the relations existing between, or the motives operating upon, the different parties. It is enough that it is the fact that the one is willing to become the surety for the other. In inquiring into the consideration, we inquire, therefore, only so far as to ascertain that a sufficient consideration exists between the principals in the transaction.

How is it in the case before us? The authorities are clear upon the two propositions involved in the question. 1. If Abram had given his note to the plaintiff, and the same had been accepted in performance of the contract without further condition, and the note was yet unmatured, the obtaining an additional indorser would have been a gratuitous act on the part of Abram, and the indorser would not be bound. He would not be bound, not because there was no direct consideration moving to himself, but because there was no sufficient consideration moving to his principal. On the other hand, if Abram had originally agreed with the lender that he would obtain the new indorser, and had obtained the money upon the faith of that promise, then his finding the additional indorser was based upon a valid consideration, and the indorser was held by his signature. To this precise point is the case of Moies v. Bird, 11 Mass. 436. This case has been recognized and affirmed in Hawkes v. Phillips, 7 Gray 284; Lovering v. Fogg, 18 Pick. 540; Leonard v. Wildes, 36 Me. 265. See, also, Parks v. Brinckerhoff, 2 Hill 663; Clark v. Rawson, 2 Denio 135.

I see no objection to the admissibility of the testimony complained of.

Judgment should be affirmed with costs.

LOTT and SUTHERLAND, J.J., dissented.

Judgment affirmed.

c. A contract of guaranty is usually independent of, and yet collateral to, the contract of the principal, and is usually entered into before or after the making of the contract of the principal, and when made afterward must be supported by a new and independent consideration, and principal and guarantor cannot be sued jointly.

MACFARLAND v. HEIM. 1895.

127 Mo. 327; 29 S. W. Rep. 1030; 48 Am. St. Rep. 629.

SHERWOOD, J. Action on a written lease bearing date August 1, 1888, to recover rent from April, 1889, to December of that year, both months inclusive. Lau was the lessee, Heim the guarantor, and Ellen J. Macfarland and husband the lessors. The land belonged to Mrs. Macfarland, who held it, so it is stated, "as her general estate." Among the defenses set up by defendant in his answer, was a plea of failure of consideration arising out of the fact that the alleged guaranty was signed by defendant long after the execution and delivery of the lease. The answer also denies an allegation of the petition that the lease had been assigned to him by Lau. The evidence very clearly establishes that, after the execution and delivery of the lease, Harding, the janitor of the building, was sent out by the husband in order to have Lau give security in the form of a guaranty from Heim. After some 10 or 12 days from the time of the execution and delivery of the lease, Heim was found, and gave the guaranty indorsed on the lease. There was no original understanding between Lau and Heim and the Macfarlands, at or before the execution of the lease, that Heim was to indorse the lease; nor was the assignment indorsed on the lease by Lau, which purported to transfer the lease to Heim, on the lease at the time the latter endorsed the lease as guarantor; nor was that indorsement under seal. This is Heim's testimony, and there is no contradiction of it, nor does the evidence show that Heim accepted the assignment, or even saw it after it was made. It was made without his knowledge or acceptance, so he states, and of this, also, there is no contradiction. In these circumstances, the trial court very properly gave the following instructions: "If the jury find that the assignment of the lease by Lau to Heim was voluntary on the part of Lau, or made under an

arrangement between plaintiffs and Lau, and that Heim had knowledge of said assignment, and never accepted it, then it imposes no obligation or duty upon Heim, and he is not bound by it." "The court instructs the jury that if they find from the evidence that plaintiffs, on the 1st day of August, 1888, executed and delivered to Jacob Lau a written lease of the property in question, and that afterwards, without any new consideration passing from the plaintiffs to Lau or to defendant, or from Lau to defendant, Heim executed a writing binding himself for the rent, such agreement was without consideration, and defendant is not bound by it."

Nothing is better settled in this state than that a subsequent agreement, which does not form any part of an original contract, nor is supported by the original consideration thereof, nor by any new consideration, is a mere nude pact, of no force or validity. Such is the situation here. Williams v. Williams, 67 Mo. 662; McMahan v. Geiger, 73 Mo. 145; Montgomery Co. v. Auchley, 92 Mo. 126, 4 S. W. 425. And the trial court rightly held that, unless Heim accepted the assignment made by Lau to him of the lease, no contractual relations in respect to that assignment were created between Lau and Heim in consequence thereof, nor any obligations cast on Heim as the result of such assignment; nor could Heim, by recognizing himself to be bound by his invalid guaranty, by promising to pay the rent, etc., confer any retrospective validity on the considerationless contract. But the trial court erred in holding and instructing that Mrs. Macfarland (not being seised of an equitable separate estate) could have any agent, either in Harding or in her husband, to bind her by any act of theirs, or that she could ratify their void acts. A void act is incapable of ratification. It is impossible to understand what is meant by the words "general estate," of which it is said Mrs. Macfarland was seised. It suffices, for the present purpose, that it is stated in the record that it was not her "equitable separate estate." It is among the fundamentals of the common law that a married woman is incapable of contracting, and her supposed contracts are void. This is still the law, except where statutory modifications have occurred. If thus incapable of contracting, then incapable, also, of authorizing another to contract for her; for this would be to make the stream rise higher than its fountain head. Story says: "* * * Every person, therefore, of full age, and not otherwise disabled,

has a complete capacity for this purpose. But infants, married women, idiots, lunatics, and other persons not *sui juris* are either wholly or partially incapable of appointing an agent. Idiots, lunatics, and other persons not *sui juris* are wholly incapable; and infants and married women are incapable, except under special circumstances. * * * So in regard to married women, ordinarily, they are incapable of appointing an agent or attorney. * * * With regard to her separate property, she may, perhaps, be entitled to dispose of it, or to incumber it, through an agent or attorney, because in relation to such separate property she is generally treated as a feme sole. I say, 'perhaps', for it may admit of question, and there do not seem to be any satisfactory authorities directly on the point." Story, Ag. (9th Ed.) 6. A similar doubt has been elsewhere intimated. Weisbrod v. Railway Co., 18 Wis. 40, and cases cited. In this state, however, it has long been steadily maintained that a feme covert, as to her separate estate in equity, is a feme sole (Turner v. Shaw, 96 Mo. 28, 8 S. W. 897, and cases cited); and therefore may charge her separate estate, and make an agent in regard thereto, to all intents and purposes as if she had never passed *sub jugum matrimonii.* But, where she is not thus seised, we have held, over and over again, that, not being *sui juris,* of course she could not appoint an agent. Wilcox v. Todd, 64 Mo. 388; Hall v. Callahan, 66 Mo. 316; Silvey v. Summer, 61 Mo. 253; Henry v. Sneed, 99 Mo. 407, 12 S. W. 907; Flesh v. Lindsay, 115 Mo. 1; Mueller v. Kaessmann, 84 Mo. 318. Counsel for defendant, however, make citation of Mead v. Spalding, 94 Mo. 48, 6 S W. 384, as asserting a contrary doctrine, and so it does, for it is there broadly asserted that "there can be no doubt but the husband may be the agent of the wife." The two cases cited from our own Reports do not sustain that position, because the first one was one where the land of the wife, the proceeds of which she brought suit for, was "her sole and separate property." Eystra v. Capbelle, 61 Mo. 578. The second one cited is Rodgers v. Bank, 69 Mo. 560, where the subject of the suit was the wife's money acquired by her under the married woman's act of 1875, section 3296. But that section authorizes the wife to appoint her husband as her agent for the disposition of her personal property, provided the authority be in writing, and we have expressly held that, in regard to that section, a married woman, respecting her personal property held

under its provisions, is a feme sole. Blair v. Railroad Co., 89 Mo. 391, 1 S. W. 350. We therefore decline to follow the ruling, Mead v. Spalding. On account of the reasons expressed in a prior part of this opinion, the error mentioned is a harmless one, and, when this is the case, such error in giving erroneous instructions constitutes no ground for reversal. Fitzgerald v. Barker, 96 Mo. 666, 10 S. W. 45; Probst v. Brock, 10 Wall. 519. Therefore judgment affirmed. All concur.

CHAPTER II.
CONSTRUCTION OF CONTRACT.

a. For the purpose of ascertaining the true meaning of contracts of suretyship and guaranty the same rules of construction are applied as are resorted to in the construction of other contracts. They are to receive a fair and reasonable construction, having in view the purposes and intention of the parties.

GATES v. McKEE. 1855.

13 N. Y. 232; 64 Am. Dec. 545.

Appeal from a judgment in favor of plaintiff in an action on a mercantile guaranty. The facts appear in the opinion.

By Court, Denio, J. If this were the first time that an instrument of this character had been before the court, and we were now called upon to construe it without the light of adjudged cases, the first inquiry would naturally be whether the limit of five hundred dollars related to the amount of purchases to be made by M. E. McKee or to the defendant's ultimate liability; and I think it clearly qualifies the responsibility of the defendant, and not the amount of M. E. McKee's future transaction with the plaintiff. It is as if he had said: "I will be responsible to the amount of five hundred dollars for what stock M. E. McKee has had or may want hereafter," etc. I also think that the words "what stock," in their relation to future purchases, have the force of whatever stock or whatever amount of stock he may want hereafter; and the word "stock" alone denotes the supply of materials for the business of the party

spoken of. The word "hereafter" seems to be used in an indefinite sense. It is not at any particular time in the future, but as if it were written at any time hereafter. The words "may want" are significant as to the character of the future dealings in contemplation, and they mean the same thing as may need or require, or may have occasion for. M. E. McKee was a shoemaker, and the plaintiff was a leather manufacturer; and reading of the paper as relating to their respective occupations, and giving the language the interpretation which I have suggested, and leaving out what is said of past indebtedness as immaterial, the following paraphrase would appear to me to express its true meaning: "Sir, I will be responsible to the amount of five hundred dollars for whatever amount of materials in his line M. E. McKee may at any time hereafter require." This is not a refined or artificial interpretation, but it is what the plaintiff, or any other person to whom such a paper might be addressed, would naturally, and in my opinion unavoidably, understand from it. If this is the meaning which the paper naturally conveys, it is the sense which the court is bound to apply to it.

The cases are not entirely harmonious as to the principles of construction which ought to govern in this class of cases, but the weight of authority is altogether in favor of construing guaranties by rules at least as favorable to the creditor as those which courts apply to other written contracts, irrespective of the consideration that the guarantor is a surety. In Mason v. Pritchard, 12 East, 227, the court said the words were to be taken as strongly against the party giving the guaranty as the sense of them would admit. The same remark is found in the opinion of the supreme court of the United States in Drummond v. Prestman, 12 Wheat. 515, which was the case of a guaranty. In Douglass v. Reynolds, 7 Pet. 115, 122, Judge STORY said, speaking of guaranties: "As these instruments are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement." In Lawrence v. McCalmont, 2 How. 426, the attention of the same learned judge was directed particularly to this question of construction. After remarking that a question had been made on the argument whether the letters of guaranty under consideration should receive a strict or a liberal construc-

tion, he said: "We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed, and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments, generally drawn up by merchants in brief language, sometimes inartificial, and often loose in their structure and aim; and to construe the words of such instruments with a nice and technical care would not only defeat the intention of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world." Further on he says: "If the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is mislead to his injury."

These extracts express so happily my notion of the rules of construction which ought to prevail in this class of cases, that I need only add that the same general principle will be found asserted with more or less distinctness in Bell v. Bruen, 1 How. 169, 186; Haigh v. Brooks, 10 Ad. & El. 309; Mayer v. Isaac, 6 Mee & W. 605; Dobbin v. Bradley, 17 Wend. 422; Hargreave v. Smee, 6 Bing. 244. In the last case TISDALE, C. J., said: "There is no reason for putting on a guaranty a construction different from what the court put on any other instrument. With regard to other instruments, the rule is, that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself." And BRONSON, J., in the case referred to from 17 Wendell, remarks that commercial guaranties are in extensive use, and that he can perceive no reason why they should not receive the same liberal construction for advancing the end which the parties had in view as is given to other contracts. I am aware that judges have in some few instances spoken of the construction *strictissimi juris* as the one to be applied to all contracts where

sureties are sought to be charged, and that Judge Story himself, in an earlier case than the one from which I have quoted, expressed the opinion that where it was doubtful whether a guaranty created a continuing obligation, the presumption should be against it: Cremer v. Higginson, 1 Mason, 366. There is a sense, undoubtedly, in which it may be said that these obligations are to be strictly construed; and it is this: that the security is not to be held beyond the very precise stipulations of his contract. He is not liable on an implied engagement where a party contracting for his own interest might be, and he has a right to insist upon the exact performance of any condition for which he has stipulated, whether others would consider it material or not. But where the question is as to the meaning of the written language in which he has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party. I feel no difficulty, therefore, in reading the short instrument which we are called upon to construe in the sense which every person, when informed of the situation of the parties, and who had considered the nature of the business it was designed to facilitate, would naturally place upon it. If I am right in the meaning which I have attributed to the several expressions contained in it, it did not look to a single transaction, or to dealings between the parties to a particular amount, and its purposes were not fully accomplished when the person whose credit was intended to be aided had once contracted a debt to the plaintiff to the amount of five hundred dollars, and had paid that debt. It contemplated a continuous business and a standing credit to the amount mentioned. If I am right in this (and the question is merely one of construction), there is no case or dictum which I have met with which will exonerate the defendant.

The adjudications are very numerous, and although I have examined more than I can conveniently refer to, I will mention the following only, each of which contains principles which will uphold the conclusion which I have arrived at, that this contract is a continuing guaranty: Fellows v. Prentiss, 3 Denio, 518 (45 Am. Dec. 484), Hand, senator; Clark v. Burdett, 2 Hall 197; Douglass v. Reynolds, 7 Pet. 113; Bent v. Hartshorn, 1 Met. 24; Bastow v. Bennett, 3 Camp. 220; Rapelye v. Bailey, 5 Conn. 149 (13 Am. Dec. 49); Mayer v. Isaac, 6 Mee. & W. 605; Mason v. Pritchard, 12 East, 227; Hargreave v. Smee, 6 Bing. 244;

Allan v. Kenning, 9 Id. 618; Hitchcock v. Humfrey, 5 Man. & Gr. 560; Martin v. Wright, 6 Ad. & El., N. S. 917. In several of these cases the intention to guarantee a continuous trading was much more distinctly expressed than in the present case; but in others, such as Mason v. Pritchard, *supra,* which has repeatedly received the sanction of the courts of this country, and has never been disapproved of in any court, and in Martin v. Wright, *supra,* which was decided quite recently, the same liberal, or I may rather say natural and reasonable, intendment was made which I have supposed ought to be applied to the instrument under consideration.

The objection that the consideration was not sufficiently expressed to satisfy the requirement of the revised statute of frauds is answered by the judgment of this court in Union Bank v. Coster's Ex'rs, 3 N. Y. 204 (53 Am. Dec. 280).

I am in favor of affirming the judgment of the supreme court.

Hand, J., delivered a concurring opinion.

Judgment affirmed.

SMITH v. MOLLESON. 1896.

148 N. Y. 241; 42 N. E. Rep. 669.

Appeal from supreme court, general term, First department.

Action by James B. Smith against Phebe G. Molleson as surety on the bond of Pratt & Molleson to plaintiff. A judgment in favor of plaintiff, entered on the verdict directed by the court, was affirmed by the general term (26 N. Y. Supp. 652), and defendant appeals. Affirmed.

O'Brien, J. The defendant has been held liable as surety upon a bond given to secure the performance, by the contractors, of a building contract, dated November 1, 1888, in which they agreed to furnish, cut, set, and clean all the new granite work for the enlargement of a public building in the city of New York. The plaintiff agreed to pay the contractors for this work the sum of $30,000, in monthly payments of not to exceed 80 per cent. "of the estimated value of the work performed on the building," the balance, or final payment, to be made when the work was completed. The work was to be done according to drawings and specifications referred to in the contract, and

the payments made upon the certificate of the plaintiff's superintendent. The rights and obligations of the parties are specified in the contract with minute detail, and among other things, it was stipulated that, in case the contractors failed to perform, the plaintiff might take possession of the work and complete it at the contractors' expense. It is conceded that they failed to perform and that the plaintiff was obliged to complete the work himself at an expense of several thousand dollars more than the contract price. It was agreed between the plaintiff and the contractors that the latter should give to him a bond to insure the faithful performance of the contract, and, in pursuance of this agreement, the defendant, in behalf of the contractors, executed, under seal, and delivered, the instrument upon which this action was brought. It bears date December 27, 1888, and was executed subsequent to the contract, and one of the conditions is that the contractors should well and truly perform the contract referred to, according to its terms, in which case the instrument should be void and of no effect, but that, in case they failed to so perform, the defendant would pay to the plaintiff his damages, sustained by reason of such non-performance, not exceeding a sum named. It is conceded that the plaintiff sustained damages by reason of the failure of the contractors to perform their contract, and the recovery is within the limits of the bond. The defense is that the bond was given without consideration, and that the defendant became released from its obligations by reason of changes in and departures from the contract guaranteed, without the defendant's consent, by the parties thereto. At the trial a verdict was directed for the plaintiff.

The plaintiff entered into the contract and bound himself, according to its terms, upon the faith of the promise of the contractors to give the bond, and it is admitted that if this was concurrent with the execution and delivery of the instrument, it would constitute a sufficient consideration. But, since the bond was given afterwards, and, as the defendant claims, subsequent to the time that the contractors had entered upon the actual performance of the contract, it is insisted that it required some new consideration. If it be true that the evidence in the case would warrant a finding by the jury that the contractors were engaged in the performance of the contract when the bond was given, it would also be true that this was by the grace and pleasure of the plaintiff, and not by virtue of any right under

the contract. Their right to insist upon performance, as against the plaintiff, and to receive the benefit of the contract, was not perfected until the bond was given. Whatever the contractors may have assumed to do before, it was only upon the delivery of the bond that the contract became complete and binding upon the plaintiff and hence the mutual obligations imposed upon the contractors at one time, and upon the plaintiff at another, furnished a consideration for the bond. Bank v. Coit, 104 N. Y. 532, 11 N. E. 54.

The other defense rests mainly upon a construction of the contract which the defendant claims to be the correct one. It should be observed at the outset that the contract guarantied is, by reference, made a part of the bond, and therefore, in order to determine the scope of the defendant's undertaking, the two instruments must be read together. It is true, as the learned counsel for the defendant contends, that the liability of a surety is *strictissimi juris.* But that does not mean that a different rule must be applied in the construction of contracts of suretyship than that which is to be applied in the construction of contracts in general. Like all other contracts, the undertaking of a surety must be construed fairly and reasonably, and according to the intention of the parties. If the surety has used ambiguous language, and the party secured has advanced his money on the faith of the interpretation most favorable to his rights, that will, ordinarily, prevail, if the instrument is open, reasonably, to such interpretation. It means that a surety shall not be held beyond the precise stipulations of his contract. He is not liable on any implied engagement, where a party contracting for his own interest might be, and he has the right to insist on the strict performance of any condition for which he has stipulated, whether others would consider it material or not. But where the question is as to the meaning of the written language in which he has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party. In this respect they are ordinary commercial obligations standing upon the same footing as other contracts. Gates v. McKee, 13 N. Y. 232, Bennett v. Draper, 139 N. Y. 266, 34 N. E. 791. When the terms of the contract guarantied have been changed, or the contract, as finally made, is not the one upon which the surety agreed to become bound, he will be released. Page v. Krekey, 137 N. Y. 307, 33 N. E.

311. But in this case there is no claim that the terms of the building contract, to which the defendant's bond related, have in any respect been changed by the parties to it. The most that is claimed is that, in its performance, the parties have so far departed from its terms as to change the defendant's condition, to her prejudice, and to deprive her of rights and benefits under the contract, which, otherwise, she would be entitled to by subrogation. Where the party secured does some act which changes the position of the surety to his injury or prejudice, the latter is no longer bound. Phelps v. Borland, 103 N. Y. 406, 9 N. E. 307; Bank v. Streeter, 106 N. Y. 186, 12 N. E. 706; Lynch v. Reynolds, 16 Johns. 40; Brown v. Williams, 4 Wend. 360; Navigation Co. v. Rolt, 6 C. B. (N. S.) 550; Calvert v. Dock Co. 2 Keen 638; Warre v. Calvert, 7 Adol. & E. 143.

The learned counsel for the defendant insists, upon his construction of the contract, that the plaintiff paid or advanced to the contractors a larger portion of the contract price than he was required to by the contract, and that it was so paid without any certificate. The contention rests upon the defendant's construction of the building contract, which, in substance, is that the provision for "monthly payments, not to exceed 80 per cent. of the estimated value of the work performed on the building," required the estimate to be based only upon the work when actually set in the building, whereas it was in fact based upon the work actually done under or in pursuance of the contract, whether the granite was actually placed in the building or not. This is the alleged departure from the terms of the contract, which constitutes the principal ground of the defense. Before the conclusion of the learned counsel for the defendant can be adopted, we must assent to the premise from which it is sought to be deduced, and that requires us to ascertain and determine the true meaning and intention of the clause of the contract above quoted. It must be given a fair and reasonable construction, and the general situation will throw some light upon the meaning of the written words. It appears that the granite required was to be quarried in Nova Scotia, transported from the quarry to a place in Connecticut, where it was to be dressed, and then transported to New York, and set in the building. The work involved in the preparation and carriage of the material was by far the most expensive part of the contract, and it appears that the contractors had no means to meet this outlay,

except the monthly payments, so that if they could realize nothing until the stone was placed in the building, they would be practically unable to perform the contract at all. This would be an unreasonable construction, and would, if acted upon, operate so oppressively as to place the contractors at the mercy of the owner, a view that is always to be avoided when possible. Russell v. Allerton, 108 N. Y. 292, 15 N. E. 391. It would deprive them of all the right to monthly payments except when and to the extent that granite had actually been placed in the walls, however large their outlay for procuring and preparing the material may have been during the month. The parties had the right to give to the expression, "work performed on the building," a broader meaning, which could very properly include the value of any work done or materials procured under the contract towards its erection, although the granite procured and prepared had not yet been placed. Since no payments were made in excess of 80 per cent. of the value of the work performed in setting the stone, and in procuring and preparing them, and as all the materials so procured and prepared actually went into the building, no advances were made by the plaintiff to the contractors beyond the fair requirements of the contract. It is said that it cannot be supposed that the plaintiff contracted to pay any part of the contract price for material at the quarry, and at the place where it was to be prepared, or for the work performed in preparing the same for use, before it could be known that it would ever actually reach the building. But since the monthly payments were stipulated for the purpose of enabling the contractors to prosecute the work, and as the operation of placing the granite in place when prepared was the least part of it, we do not think that this view would be unreasonable or improbable. It gave to the plaintiff reasonable assurance and protection against loss, and at the same time enabled the contractors to prosecute the work. While the plaintiff is described in the contract as owner, he in fact had no interest whatever in the building, but was the general and immediate contractor from the city for the erection of the whole building, and the defendant's principals were his subcontractors for a particular and specific part of the work, namely, the granite work. The plaintiff was not entitled to his contract price from the city until the building was completed, though the officers representing it had discretion to make advances. Moreover, by

a clause in the contract, the plaintiff, in case the subcontractors abandoned the work or failed to perform, could terminate the contract and go on with the work himself, and in that event the material in process of preparation should belong to him for the purpose of completing the work, whether such material was at the building, at the quarry, or at some other place. So that the plaintiff, in stipulating for monthly payments, estimated upon the work actually performed, whether in the building or not, assumed nothing more than the ordinary and usual risks incident to all contracts of that character. We do not think, therefore, that the meaning of the contract should be made to depend upon the use of the words, "on the building," when we can see, from the situation of the parties, the nature of the work, and other provisions of the instrument, that the intention was to make the advances as the work progressed. To give to it the other construction would, in practice, disable the contractors at the very outset from performance, and impose upon the defendant a liability, inevitable from the beginning, and possibly in a much larger amount than has followed the construction adopted by the parties themselves.

The objection that the payments were made without the certificate may be answered in the same way. The owner could dispense with it if he so elected, under the terms of the contract, if not upon general principles, and since the payments made without it were not greater in amount than, upon the true construction of the contract, they should have been if it had been exacted, the omission of the owner to insist upon it did not prejudice the surety. We are not dealing, now, with any actual change in the terms of the contract, but with acts or omissions of the plaintiff in the performance, which, in order to operate to release the surety, must be of such a character that it can be said that her position was changed to her prejudice. It should also be observed that there is a clause in the contract the material part of which reads as follows: "Should the owner, at any time during the progress of the said work, request any alterations, deviations, additions, or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract." The defendant, having, by reference, in effect made the contract a part of the bond, must be deemed to have assented to this provision, and to any changes or deviations in performance from the building

contract made under it. She has, in effect, guarantied the performance of a written contract between other parties, which, by its terms, permitted the parties to change it or deviate from it. While it is not important to consider the real scope of this clause, since we prefer to dispose of the questions in the case upon the ground that there was no material departure from the contract, when properly construed, it should be noted that she consented in advance to changes of some character which are permitted by the contract in language quite broad and comprehensive. It would not be difficult to show that the plaintiff might, under this provision at least, dispense with the formality of a certificate when called upon by the contractors, from time to time, for some portion of the contract price, without discharging the surety, even though it was more important to the defendant's interest and protection than it appears to be. It is manifest that the provision was intended for the benefit of the owner alone, and he could waive it without affecting the defendant's liability.

The contractors having failed to complete the work, the plaintiff gave the notice required by the contract in order to terminate it. The contract provides when and upon what contingencies the plaintiff could terminate, and the manner of proceeding for that purpose. The final act which was to put an end to the contract was taking possession of the premises by the plaintiff. The notice may have been a necessary step, or formality in that direction, but, of itself, it did not operate to bring the contract to an end. It was clearly within the power of the plaintiff to recall it, after given, if not upon general principles, then under the permission contained in the contract. It appears that he was induced, subsequently, to allow the contractors to go on, and they again attempted to complete the work, and again failed. It is said that the loss which the plaintiff sustained, and for which the recovery was had, occurred under this permission, and the defendant's counsel treats this last effort at performance as a new contract in regard to which the surety was not bound. It was manifestly nothing more than a mere waiver or recall of the notice for the termination of the contract, and the work was performed and payment made, not upon a new contract, but upon the old one, up to the time that the final notice was given, when the plaintiff was obliged to take possession of the work. The case was very fully considered in the court below,

and, as we have sufficiently indicated the ground of our concurrence in the decision upon points that are controlling, it is unnecessary to notice other and minor questions in the case. The judgment should therefore be affirmed, with costs. All concur.

Judgment affirmed.

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b. The obligation of a surety or guarantor is strictissimi juris and cannot be extended by implication. The obligor may rely on the strict letter of his contract.

SHREFFLER v. NADELHOFFER.

133 Ill. 536; 25 N. E. Rep. 630; 23 Am. St. Rep. 626.

Appeal from appellate court, second district.

BAILEY, J. Certain questions arising upon the pleadings are presented by counsel, which we will notice first. It is said that the defendants' eighth plea presented a complete defense to the action, and, as that plea was unanswered, judgment should have been rendered thereon for the defendants. It appears that the defendants went to trial without objection that said plea was unanswered, and without moving for any judgment thereon for want of a replication. They thereby waived the necessity of a formal issue. As we said in Strohm v. Hayes, 70 Ill. 41, it is the settled doctrine of this court that, proceeding to trial where an issue is not made up on one of the pleas, such issue is considered as waived, or the irregularity is cured by verdict. Furthermore, said eighth plea purports to answer only the third count of the declaration, and, as that count was dismissed by the plaintiff prior to the trial, such dismissal carried the eighth plea with it, and that plea was no longer in the case, and there was no occasion for answering it.

Again, it is insisted that each of the several counts in the declaration is insufficient to show a cause of action, and that the defendant's motion in arrest of judgment should therefore have been sustained. The alleged defect in the first, second, and fourth counts is that, except as to the first breach assigned in the first count, there is no averment that the decree recited in the appeal-bond has ever been affirmed by the appellate court.

It is difficult to see how, as the record now stands, the defendants can avail themselves of this defect in the second count, or in the second breach assigned in the first count. Said second breach in the first count and said second count were both demurred to by the defendants, and, their demurrer being overruled, they abandoned it, and filed various pleas in bar. The only assignment of error by which the alleged defect in the first and second counts are presented for consideration here is the one which calls in question the decision of the trial court overruling the defendants' motion in arrest of judgment, and the settled doctrine of this court is that where a defendant demurs to a declaration, and, after his demurrer is overruled, pleads over, he will be precluded from insisting upon a motion in arrest of judgment for insufficiency in the declaration. Quincy Coal Co. v. Hood, 77 Ill. 68; Express Co. v. Pinckney, 29 Ill. 392; Independent Order, etc., v. Paine, 122 Ill. 625, 14 N. E. Rep. 42; Rouse v. County of Peoria, 2 Gilman, 99; 2 Tidd, Pr. 918. But we think the fifth count, especially after verdict, is sufficient to sustain the judgment; and that being so, the court properly overruled the motion in arrest of judgment, even though all the other counts may have been defective. Section 57 of the practice act provides that "whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts of the declaration be sufficient to sustain the verdict." Rev. St. 1889, c. 110, § 58. See, also, Gebbie v. Mooney, 121 Ill. 255, 12 N. E. Rep. 472, and authorities cited. The objection urged to the other counts does not exist in the fifth count, as that count contains a sufficient averment of the affirmance by the appellate court of the decree appealed from. But it is claimed that said count is defective in failing to state the names of the parties who had agreed to or were about to purchase said note, and the sale to whom was defeated by the continuance of the injunction. The allegation of damages in said count is, in substance, that at the time the order continuing the injunction was made, the note, the sale and transfer of which was restrained, had a market value of $10,000, the makers and guarantors of said note then being men of great wealth and financial standing; that, but for the injunction, the note could have been negotiated and sold for that sum, and that the plaintiff was offered that sum for it by divers responsible parties, and would

have disposed of and sold it, without recourse, for that sum, if the injunction had not been continued in force; that by reason of the continuance of the injunction, the plaintiff was delayed and hindered in making such disposition of the note for the period of 10 months, and that during that period the makers and guarantors of the note became financially irresponsible, whereby the note became worthless. Without pausing to determine whether, in this case, the rules of good pleading required the plaintiff to state the names of the parties who had offered to purchase said note, or to whom he would have sold it if he had not been prevented from doing so by the continuance of the injunction, the case is one merely of a defective statement of a cause of action, and not one where no cause of action is stated, and the defect is therefore one which is cured by verdict. The rule on this subject, as laid down by Mr. Gould in his treatise on Pleading, is as follows: "Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor; because, to entitle him to recover, all circumstances necessary, in form or substance, to complete a title so imperfectly stated must be proved at the trial, and it is therefore a fair presumption that they are proved. But where no cause of action is stated, the omission is not cured by verdict. For, as no right of recovery was necessary to be proved, or could have been legally proved under such a declaration, there can be no ground for presuming that it was proved at the trial." Gould, Pl. 463. The allegations of said fifth count were clearly sufficient to admit proof of the names of the parties with whom the plaintiff had negotiated the sale of said note, and to whom he was prevented from making such sale by the continuance of the injunction, and it will therefore be presumed, as was the fact, that such proof was made at the trial.

But the question to which our attention has been chiefly directed, and the one which presents the greatest difficulty, is whether any breach of the condition of the bond sued on is shown. The decision of that question must turn wholly upon the construction to be placed upon the language of the condition. That language is as follows: "Now, if the said Andrew Dillman and Edward R. Knowlton shall duly prosecute said appeal, and shall moreover pay all damages, and damages growing out of the continuance of the injunction herein, costs of suit rendered

and to be rendered against them, the said Andrew Dillman and Edward R. Knowlton, by said court in case the said decree shall be affirmed in said appellate court, then the obligation to be null and void; otherwise to remain in full force and virtue." The judgment of the appellate court simply affirmed the decree appealed from, and awarded the appellee, the plaintiff here, his costs in that court. No judgment for damages was rendered by the appellate court against Dillman and Knowlton, or the survivor of them, and no such judgment could have been rendered, as that court had no jurisdiction or authority, on affirming the decree, to make an award, to the party entitled thereto, of his damages growing out of the continuance of the injunction. It is not disputed that the costs adjudged to the appellee were paid prior to the commencement of the suit on the bond, and there was therefore no breach of the condition of the bond by reason of the non-payment of said costs. The defendants contend that, by a proper construction of said condition, the phrase, "rendered and to be rendered against them, the said Andrew Dillman and Edward R. Knowlton, by said court," should be held to apply to and qualify the words "all damages, and damages growing out of the continuance of the injunction herein," and therefore that no damages consequent upon the taking of the appeal, or growing out of the continuance of the injunction are within the condition, except such as the appellate court should award in its judgment. As the appellate court had no power to award damages growing out of the continuance of the injunction, this construction manifestly renders that part of the condition wholly meaningless and nugatory.

Two of the defendants being sureties, their liabilities must undoubtedly be determined in accordance with the rules of law applicable to that relation. It is a rule universally recognized by the courts, that a surety has a right to stand upon the strict terms of his obligations, when such terms are ascertained. As said by Mr. Justice STORY in Miller v. Stewart, 9 Wheat. 681: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of the contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change of the contract, or that it may even be for his benefit. He has a right

to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as law, have been in the constant habit of scanning the contracts of sureties with considerable strictness." The rule thus laid down by Mr. Justice Story has been repeated and adopted by this court in numerous decisions. Field v. Rawlings, 1 Gilman, 581; Waters v. Simpson, 2 Gilman, 570; Reynolds v. Hall, 1 Scam. 35; People v. Moon, 3 Scam. 125; Governor v. Ridgeway, 12 Ill. 14; Ryan v. Trustees, 14 Ill. 20; Railroad Co. v. Higgins, 58 Ill. 128; Stull v. Hance, 62 Ill. 52; People v. Tompkins, 74 Ill. 482; Cooper v. People, 85 Ill. 417; Mix v. Singleton, 86 Ill. 194; Phillips v. Manufacturing Co., 88 Ill. 305; Dodgson v. Henderson, 113 Ill. 360; Trustees v. Sheik, 119 Ill. 579, 8 N. E. Rep. 189; Insurance Co. v. Johnson, 120 Ill. 622, 12 N. E. Rep. 205; Vinyard v. Barnes, 124 Ill. 346, 16 N. E. Rep. 254. In many of these cases we have said that the contract of a surety is to be strictly construed, and that his liability is not to be extended by implication, and such has long been the settled law in this state. It is not meant by this rule, however, that the courts, in endeavoring to ascertain the precise terms of the contract actually made by a surety, may not resort to the same aids, and invoke the same canons of interpretation, which apply in case of other contracts. Thus, in Stull v. Hance, 62 Ill. 52, the rule that in construing contracts and written agreements, the whole context should be considered, and the intention of the parties ascertained from it, was applied to the interpretation of the contract of a surety, and in Mix v. Singleton, 86 Ill. 194, where a similar contract was under consideration, the rule that the words used should be construed as ordinarily understood was applied. Indeed, any other mode of interpretation would lead to the absurd result of giving to the same set of words in a contract one force and meaning when the principal is defendant, and a different force and meaning when the suit happens to be brought against the surety or guarantor. The rule of strict construction, as applied to the contract of sureties and guarantors, in no way interferes with the use of the ordinary tests by which the actual meaning and intention of contracting parties are ordinarily determined, but merely limits their liability strictly to the terms of their contract, when those terms are ascertained, and forbids any extension of such liability by implication beyond the strict

letter of those terms. Various decisions in other states may be cited in support of this position. Thus, in Locke v. McVean, 33 Mich. 473, the court, after reviewing many English and American decisions, says: "The view now generally received appears to be that, for the purpose of finding out what the contract is, the same course is to be pursued that the law authorizes to ascertain what the parties have agreed upon in the case of other mercantile contracts, but, when an understanding is once reached of the true agreement, the rules and principles which pertain to the rights and duties of principal and surety apply." In Kastner v. Winstanley, 20 U. C. C. P. 101, the court, after reviewing various English authorities, says: "The rule of construction, then, of a contract of this description is to construe it as all other contracts, not giving a strict meaning to the words used against the party using them, nor yet as against the party in whose favor they are used, but to collect the real intention of the parties from the terms used in the contract, taking them in their plain, ordinary, and popular sense, unless by the known usage of the trade they have acquired a peculiar sense, and from the surrounding circumstances." In Hamilton v. Van Rensselaer, 43 N. Y. 244, Chief Justice CHURCH, in discussing the proper interpretation to be put upon a contract of guaranty, says: "In ascertaining the meaning of the language used, the same rules of construction are applicable to contracts of suretyship as to other contracts. When the true signification of the contract is ascertained, the surety or guarantor has a right to insist that his liability shall not be extended beyond its precise terms." In Belloni v. Freeborn, 63 N. Y. 383, the court, in discussing the same subject, say: "There is no rule exclusively applicable to instruments of suretyship, and requiring them to be in all cases interpreted with stringency and critical acumen in favor of the surety and against the creditor, and all ambiguities to be resolved to the advantage of the promisor, and every liability excluded from the operation of the instrument that can, by a strained and refined construction, be deemed outside of the agreement. In guaranties, letters of credit, and other obligations of sureties, the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument, read in the light of the surrounding circumstances, and the purposes for which it was

made. If the terms are ambiguous, the ambiguity may be explained by reference to the circumstances surrounding the parties, and by such aids as are allowable in other cases. * * * * The surety is not liable on an implied engagement, and his obligation cannot be extended, by construction or implication, beyond the precise terms of the instrument by which he has become surety. But in such instruments the meaning of the written language is to be ascertained in the same manner and by the same rules as in other instruments; and when the meaning is ascertained, effect is to be given to it." See, also, Gates v. McKee, 13 N. Y. 232; Crist v. Burlingame, 62 Barb. 351; Brandt, Sur. 105 *et seq.* It must be conceded that the condition of the bond in question, when read by itself, and without reference to surrounding circumstances, is of doubtful meaning. The draughtsman, in preparing the bond, instead of drawing two bonds, one to serve as an appeal-bond, and the other as an injunction bond, took a blank appeal-bond, and endeavored, by inserting a clause providing for the payment of the damages growing out of the continuance of the injunction, to make it serve the purposes of both an appeal and an injunction bond. The place in which the last-named clause is inserted, and its relation to the other words of the condition are such as to render it uncertain, if we consider merely what appears upon the face of the instrument, whether the undertaking is to pay all damages growing out of the continuance of the injunction, in case the decree is affirmed by the appellate court, or merely to pay all such damages arising from that cause as should be awarded against the obligors by the judgment of that court. Either reading may be adopted without doing violence to any of the language of the condition. But when we view the condition in the light of surrounding circumstances there can be no reasonable doubt as to which of these meanings was within the purpose and intent of the parties. Of these circumstances we may notice, first, the fact that the appellate court had no jurisdiction, whatever might be the outcome of the appeal, to render judgment against the obligors for the damages resulting from the continuance of the injunction. We must attribute to the obligors the intention to enter into an obligation, every provision of which would be valid, but if the condition is interpreted as importing an obligation to pay only such damages as should be adjudged by the appel-

late court, it becomes, so far as that part of it is concerned, merely senseless and nugatory.

Then again, the circumstances under which the appeal was taken and the bond given point to the conclusion that it was the intention of the obligors to secure to the obligee the payment of the damages growing out of the continuance of the injunction in case the decree should be affirmed. The circuit court had rendered its decree dismissing the bill for want of equity and dissolving the injunction. The complainants desired to remove the record to the appellate court for review, and to have the injunction continued in force until the final decision of that court. To obtain such continuance of an injunction a party is ordinarily required to execute to the opposite party a bond indemnifying him against all damages which may thereby result to him. This we think the obligors wished and intended and undertook to do; and if the bond is equally susceptible of two interpretations, one of which is consistent with and accomplishes that intention, as we think it is, it is very clear that such interpretation must be deemed to be the true one. The undertaking to pay the appellee his damages upon the sole condition that the decree should be affirmed by the appellate court must be held to be within the strict terms of the bond as the obligors made it, and not an obligation imported into it by implication or construction. One of the assignments of error, which we have not noticed until now, calls in question the decision of the circuit court in sustaining a demurrer to the defendants' second, tenth, twelfth, and eighteenth pleas. The second plea is based upon that interpretation of the bond in question which we have shown is not the true one, and the demurrer to it was therefore properly sustained. The facts alleged in the tenth and twelfth pleas, so far as they seem to be material, are substantially alleged in other pleas, and the defendants had the advantage of the defenses thereby presented. The eighteenth plea alleges facts which seem to us to be wholly immaterial, and it was properly held insufficient on demurrer. We are of the opinion that the judgment of the appellate court should be affirmed, and an order to that effect will accordingly be entered.

End

EVANSVILLE NATIONAL BANK v. KAUFMANN.

93 N. Y. 273; 45 Am. Rep. 204.

Action on drafts. The opinion states the case. The defendant had judgment at trial, which was reversed by the General Term.

Ruger, Ch. J. Guaranties are distinguished in the law as being either general or special. Special guaranties being those which operate in favor of the particular persons only to whom they are addressed, while general guaranties are open for acceptance by the public generally. They are sometimes further classified into those limited to a single transaction and those embracing continuous or successive dealings. Gates v. McKee, 13 N. Y. 232; Church v. Brown, 21 id. 329.

The liability of the defendants in this case depends upon the solution of the question to which of these classes the guaranty in suit belongs. If it be regarded as a general guaranty, there is no just defense to this action. If however it is a mere special guaranty, although continuous in its character, other questions will arise for consideration. Many of the earlier cases arising upon guaranties, both here and in England, were largely controlled by the question of their negotiability; and it was uniformly held that no action would lie at the suit of an assignee upon a special guaranty because no privity existed between such assignee and the guarantor. Robbins v. Bingham, 4 Johns. 476; Walsh v. Bailie, 10 id. 180; Chitty on Bills, 273, 308 (ed. 1839); Newcomb v. Clark, 1 Denio, 226; Birckhead v. Brown, 5 Hill, 634. This obstacle was removed in this State by the Code of Procedure, which authorized any party acquiring an interest in a guaranty to bring his action and recover thereon, provided a cause of action previously existed upon the contract in favor of his assignor. The real party in interest in such contracts is now entitled to maintain an action for damages arising from a breach of such contract in his own name, although he was not originally privy to it.

In other words the same effect is now given to an equitable that formerly pertained to a legal assignment, and they are now both equally cognizable in a court of law.

It follows that Bingham Brothers could assign to the plaintiff, and the latter recover upon any cause of action accruing

to them under the letter of credit in question existing against the defendants at the time of the discount of the drafts in suit.

The true distinction between general and special guaranties, as contained in letters of credit, is that upon the faith of a general guaranty any person is entitled to advance money, or incur liability, upon complying with its terms, and can recover thereon the same as though specially named therein. Union Bank of Louisiana v. Coster, 3 N. Y. 203.

In the case of a special guaranty however the liberty of accepting its terms is confined to the persons to whom it is addressed, and no cause of action can arise thereon except by their action in complying with its conditions.

Such a guaranty contemplates a trust in the person of the promisee and from its very nature is not assignable until a right of action has arisen thereon, which may, like any other cause of action arising upon contract, be then assigned.

The authority of the cases holding that no privity exists between the assignee of a guaranty and the guarantor, sufficient to enable the former to maintain an action thereon, has thus ceased by force of the provisions of the Code.

Though this be so, the common-law rule applies to contracts of guaranty as well as to other contracts, that a consideration is necessary to render them valid; and that unless such consideration be acknowledged by the contract itself, it is still necessary to prove one in order to recover thereon. Leonard v. Vredenburgh, 8 Johns. 29; 5 Am. Dec. 317; Bailey v. Freeman, 4 id. 280; 6 Am. Dec. 371; Brandt on Suretyship, 7.

It was formerly held that such contracts were void by the statute of frauds unless their consideration was also expressed upon the face of the instrument itself. Union Bank v. Coster Ex'r, 3 N. Y. 211; Newcomb v. Clark, 1 Denio, 226.

But this rule was modified by other cases holding that where the nature of the consideration was fairly inferable from the contract sued upon, or was contained in a written instrument contemporaneously executed and forming a part of the transaction, it would satisfy the requirement of the statute. Gates v. McKee, *supra;* Church v. Brown, 21 N. Y. 315; Douglas v. Howland, 24 Wend. 35; Leonard v. Vredenburgh, *supra;* Rogers v. Kneeland, 10 Wend. 218.

The cases of Brewster v. Silence, 8 N. Y. 207, and Draper v.

Snow, 20 id. 331, holding a contrary doctrine, have been much shaken, as authority upon this question, by the later cases above cited.

The statute of frauds was amended in this State by chapter 464 of the Laws of 1863, omitting in its re-enactment the provision requiring the consideration of a promise to answer for the debt, default or miscarriage of another, to be expressed in the writing containing such promise.

The effect of this amendment was to dispense with the necessity of such statement in the instrument itself (Speyers v. Lambert, 6 Abb. Pr. (N. S.) 309), but it left it still indispensable that a consideration in fact for the promise should exist in order to entitle the promisee to recover thereon. Brandt on Suretyship, 90.

Regarding this case therefore as unaffected by the questions referred to, its solution seems to depend upon the answer to be made to these two propositions: First, as to whether the guaranty in question is general or special; and second, if it be found to be a special guaranty, whether any good cause of action arose thereon in favor of the persons to whom it was addressed, which has been assigned to the plaintiff in this action. Besides a consideration, it is essential that a contract of this kind should be between proper parties, *viz.*, a promisor or guarantor; a principal and a promisee; and it is just as essential that such contracts should describe or refer to these parties so as to identify them, either individually or as a class.

It is always competent for a guarantor to limit his liability, either as to time, amount or parties, by the terms of his contract, and if any such limitation be disregarded by the party who claims under it the guarantor is not bound. It follows that no one can accept its propositions or acquire any advantage therefrom unless he is expressly referred to or necessarily embraced in the description of the persons to whom the offer of guaranty is addressed. Robbins v. Bingham, *supra;* Union Bank v. Coster, *supra;* Church v. Brown, *supra;* Walsh v. Bailie, *supra;* Dodge v. Lean, 13 Johns. 508; Brandt on Suretyship, 88; Bailey v. Ogden, 3 Johns. 399, 3 Am. Dec. 509.

In the case of a special guaranty the consideration necessary to support the promise may be either one furnished by the principal to the guarantor, or by the promisee to either the

principal or some third person, according to the terms of the guaranty.

A general letter of credit is addressed to and invites people generally to advance money, give credit, or sell property in reliance upon it, and when this is done the contract is complete, and the acceptor becomes a party to it and may enforce it for his own benefit.

In such cases the promisee has, upon the request of the guarantor, furnished the consideration contemplated by the guaranty and brought himself within its terms and the requirements of law. Union Bank v. Coster, *supra;* Church v. Brown, *supra;* Birckhead v. Brown, *supra.*

To come to the case in hand it will be found that the guaranty neither in its address nor contents refers either directly or indirectly to any other persons than the immediate parties thereto. These parties are Kaufmann & Blun, the guarantors, Feigelstock, the principal, and Bingham Bros., the promisees.

It has been said that the allusion in the letter to the word "drafts" implies the negotiation of these instruments to third persons. This idea we think is not necessarily or generally conveyed by this expression.

Drafts, as used in the collection of debts, are not usually negotiable. The office of a draft is to collect for the drawer from the drawee, residing in another place, money to which the former may be entitled, either on account of balances due or advances upon consignments, and although they may sometimes be used for raising money, that is not the necessary or ordinary purpose for which they are employed.

We might therefore well hold that no such doubt or uncertainty appears upon the face of this guaranty as entitles the plaintiff to furnish extrinsic evidence to determine its signification.

The plaintiff however claims the right to resort to such evidence to show that the defendants intended, or that it had the right to infer that their guaranty was intended for such persons as should advance money upon Bingham Bros.' drafts before their acceptance by Feigelstock.

Some controversy appears by the cases to have formerly existed in respect to the rule governing the courts in the construction of guaranties, whether that should apply which entitled a surety to have his contract strictly construed, or

that imposing upon a party using the language the liability of having it interpreted most strongly against him, but the weight of authority now seems to favor that construction which shall accord with the apparent intention of the parties, in conformity with the rule the construction of contracts generally. Rindge v. Judson, 24 N. Y. 70; Gates v. McKee, *supra;* Dobbin v. Bradley, 17 Wend. 422.

But when the meaning of the language used in a guaranty is ascertained, the surety is entitled to the application of the strict rule of construction and cannot be held beyond the precise terms of his contract. Gates v. McKee, 13 N. Y. 232; People v. Chalmers, 60 id. 158; Kingsbury v. Westfall, 61 id. 356.

When therefore the language of a guaranty is ambiguous and does not furnish conclusive evidence of its meaning, we are entitled to look at all of the circumstances of the case and arrive at the intention of the parties from these sources of information. Agawam Bank v. Strever, 18 N. Y. 502; Brandt on Suretyship, 106; Walrath v. Thompson, 4 Hill, 200; Fell's Law of Guaranty, 43; Gates v. McKee, *supra;* Keate v. Temple, 1 B. & P. 158; Springsteen v. Samson, 32 N. Y. 703; Karmuller v. Krotz, 18 Iowa, 352; Hasbrook v. Paddock, 1 Barb. 637.

Assuming therefore that there is an ambiguity in this letter requiring explanation, we will examine the case in the light of the general principles which have been stated.

The action is based upon two drafts made by Bingham Bros., of Evansville, Indiana, upon A. Feigelstock, of New York, and payable respectively one for $5,000 sixty days after date, and one for $2,500 fifteen days after sight. These drafts were discounted by the plaintiff at its bank in Evansville, at their respective dates, and the proceeds duly paid to Bingham Bros. Each of them was afterwards duly protested for non-acceptance and non-payment by Feigelstock. These drafts belonged to a series of similar character discounted by the plaintiff for Bingham Bros., and were the only ones remaining unpaid by Feigelstock at their maturity.

At the commencement of this course of business Bingham Bros. produced to and left with the plaintiff the letter of credit upon which this action is founded, and it was delivered as security for the amount intended to be loaned upon such drafts.

No bills of lading or consignments of property by Bingham

Bros. to Feigelstock accompanied the drafts, and that for $5,000 appeared upon its face to be an accommodation draft. No notice of these transactions was ever given to the defendants, and it did not appear that they had any knowledge of the several discounts. The letter expressing the guaranty upon which the action is brought is as follows:

"New York, December 29, 1874.

"Messrs. Bingham Bros., Evansville, Ind.:

"Dear Sirs—Any drafts that you may draw on Mr. A. Feigelstock, of our city, we guarantee to be paid at maturity.

"Yours truly,

"KAUFMANN & BLUN."

While the letter will be seen to be couched in broad and indefinite terms with respect to the number, amount and character of the drafts referred to, Bingham Bros. alone are addressed. However general may be the description of the subjects guaranteed the number of persons authorized to accept its terms is not thereby enlarged.

The letter is subject to all of the limitations expressed therein, and also to such as may fairly be implied from its language, and the natural course of business transactions between its several parties. General letters of credit are, from necessity, delivered to the persons who expect to profit by their aid, and are intended to be exhibited by them wherever and whenever assistance is required. The fact of the possession of a letter of credit by a person from whom credit is sought militates against its generality. The absence in this letter of any assurance that the drafts specified should be accepted on presentation seems to imply that sight drafts alone were contemplated by the parties. So too the absence of any reference to the consideration of this guaranty is significant, and would seem to suggest to a prudent man the propriety of an inquiry into the situation of the parties, and the nature of the business in which the guaranty was to be used before advancing largely upon the faith thereof. Such an investigation would have enabled the plaintiff to see that it was not justified in drawing the inference which it claims to have done from the language of this instrument.

Bingham Bros. resided and were manufacturers of spirits at Evansville, in the State of Indiana, remote from the guarantors

and the drawee of the drafts. Feigelstock was a merchant residing in New York engaged in the business of receiving and selling on commission goods consigned to him by third parties.

The plaintiff was a bank doing business in the State of Indiana, and the defendants were merchants in the city of New York. At the date of the guaranty these various parties were strangers to each other, except that the plaintiff and Bingham Bros. resided at the same place, and had previously had business transactions together. There is no evidence as to the relations existing between the defendants and Feigelstock, but it is claimed in the answer, and was offered to be proved on the trial, that they were strangers to each other, and that the guaranty was given by the defendants as a favor to a person who was in their employ, and who was a relative of Feigelstock.

There would seem to be no motive reasonably inferable from such a situation and relationship sufficiently powerful to induce the defendants to lend their unlimited credit for the benefit and advantage of Bingham Bros. alone. The contention of the plaintiff leads to the proposition that it had a right to infer that Bingham Bros. were authorized by the defendants to go to any place and with any person contract to bind the defendants for unlimited sums. Under such a construction the defendants could never revoke this authority, for it would be practically impossible to reach by notice all of the persons who might be applied to for advances upon this letter.

To uphold this judgment we are required to hold that the plaintiff had the right to infer from the language of the letter, and the circumstances of the case, that the defendants, without any apparent motive for so doing, had clothed Bingham Bros. with irrevocable authority to use their names in borrowing money at remote and multiplied points, for unlimited amounts and unrestricted periods of credit.

Certainly, if the plaintiff believed this, it was not justified in placing much reliance upon the continued responsibility of persons transacting business in so reckless a manner.

A transaction of such a character would be so improvident and unnatural that to establish it in any case should require the strongest evidence, but especially so when it is claimed that such powers have been conferred upon entire strangers.

The unnatural confidence in others, and the careless assump-

tion of obligations which such a course of business would imply, is so unusual as to justify the requirement that if such an authority was intended to be conferred it should have been expressed in clear and unequivocal language.

It is obvious that neither Feigelstock nor Kaufmann & Blun could have derived any benefit or advantage from the discount of bills whose proceeds were, as appears from the face of the transaction, intended for the sole use of Bingham Bros.

Even if the relation of consignor and consignee existed between Bingham Bros. and Feigelstock, we do not think the usual course of business between such parties justifies the assumption that the use of accommodation paper for either limited or unlimited amounts is the necessary or usual accompaniment of such a connection. On the other hand, if we consider this letter as intended to furnish a credit to Feigelstock with the manufacturers and consignors of property in which he dealt, it would satisfy the apparent object of the letter, and the transactions would assume a natural and reasonable character such as pertains to the ordinary and usual course of business among commercial men.

There would necessarily be a limit to such a course of business, and the liability of the defendants would be modified by the transfer of property to correspond with the amount of the obligation assumed, and creating a liability which might be safely and reasonably incurred. Of course, if the defendants have signed a guaranty, either general or special, upon a sufficient consideration, by which they have unqualifiedly promised to become liable for the payment of all such drafts as Bingham Bros. might thereafter draw on Feigelstock, their liability, however comprehensive, would not be affected by its imprudence. But such is not the contract under consideration.

We are therefore of the opinion, from the fact that the letter was addressed to Bingham Bros. alone, the absence of any allusion to its consideration or the negotiability of the drafts therein referred to, and a consideration of the situation and the relation of the parties, that the intention could not fairly be imputed to the defendants of making the guaranty contained in the letter general and open for acceptance by any one who might choose to comply with its terms.

We have been unable to find any case which either requires or authorizes the classification of this letter as a general guar-

anty. In each of the numerous cases cited in which the instrument considered was held to be a general guaranty, it was either addressed generally or the guaranty contained inherent evidence that it was intended to be used in obtaining credit wherever it was needed.

In the case of Benedict v. Sheriff, Hill & Denio's Sup. 219, the letter was addressed to a clerk in favor of a country merchant visiting New York to purchase a supply of goods for his trade, and stated, "I will guarantee the payment of such debts as he may contract for the purchase of goods." It was held that this letter contemplated different purchases of different persons, and could not have been intended for the person addressed, as he had no goods to sell.

The case of Duval v. Trask, 12 Mass. 155, is like that last cited.

In Union Bank v. Coster, the letter was open and unaddressed, and expressly contemplated the negotiation of the drafts referred to therein by some bank for the benefit of the persons having possession of the letter.

In Russell v. Wiggin, 2 Story, 213, the court said that an action could be maintained by a person advancing money upon "letter of credit written by persons who are to become the drawees of bills, drawn under it, promising to accept such bills when drawn, which letter, although addressed to the persons who are to be the drawers of the bills, is designed to be shown to any person or persons whatsoever." Here it is evident that stress is laid upon the character of the letter, as showing that it was designed for the persons advancing money upon the faith of the letter.

The case was that of a letter given by Wiggin to the master of a vessel sailing from Boston to India to establish a credit for him in England, and bore inherent evidence that it was intended for third persons.

In Lonsdale v. Lafayette Bank of Cincinnati, 18 Ohio 126, the guaranty required the drafts to be accompanied by bills of lading of shipments to the address of the guarantors. Upon the shipment of the goods and the attaching of bills of lading to the drafts, a cause of action arose in favor of the promisee in the guaranty which could be lawfully assigned to a third party who could bring his action upon the assigned claim as we have

already stated. The case is not an authority upon the question as to whether the guaranty is general or special.

The case of Monroe v. Pilkington, 14 How. Pr. 250, is referred to as a strong case for the plaintiff, and does probably come nearer sustaining its position than any other cited. The case is a Special Term case, and the question arose on a demurrer to the complaint. The letter there under discussion is plainly to be distinguished in material points from the one in the case at bar. It was from a firm residing in England to another in this country, and evidently referred to and intended to promote the business of selling at New York, exchanges upon Liverpool. The inference was drawn by the court from the letter and the course of business that it was intended to be exhibited to persons buying exchange upon Liverpool, and thus give the person addressed additional facilities to carry on the business of selling exchange.

In Lawrason v. Mason, 3 Cranch, 492, the letter, although addressed to the person for whom the guarantor offered to become security, was by its express terms intended for the person who should furnish on credit the property referred to in the letter, and could have no other office to perform.

On the other hand, it was said by Judge COMSTOCK, in Church v. Brown, *supra*, that "An undertaking by one person to be responsible for goods to be delivered to another is in effect a request to deliver the goods. It is in law no more and no less than a letter of credit, general and particular, according as it may or may not have a particular address."

The case of Birckhead v. Brown, not only on account of the reasoning by which it is supported, but because it is the decision of a court distinguished for learning and ability, is entitled to great weight, although some of the reasons urged in support of the judgment are no longer tenable, owing to the provisions of our Code and the principles adopted in later cases. Brown Brothers & Co., of New York, addressed a letter to W. & J. Brown & Co., of Liverpool, at the request of Smith & Town, stating that they desired "to open a credit for £10,000, say ten thousand pounds sterling uncovered at any one time, in favor of Mr. James Demarest, to be negotiated by him in Rio de Janeiro by drafts on you at sixty days sight." Demarest was the commercial agent of Smith & Town, and represented them at Rio de Janeiro. Upon

the faith of this letter Birckhead & Co. discounted drafts at the request of Demarest, and upon their non-payment by W. & J. Brown & Co., brought an action against the guarantors. Bronson, J., delivering the opinion of the court, says: "These letters have been divided into two classes, general and special. They are general when addressed to any or all persons without naming any one in particular. They are special when addressed to a particular individual or firm." "When the letter is special, or in other words addressed to a particular individual, he alone has the right to act upon and acquire rights under it. If any one else attempts to accept and act upon the proposition contained in the letter, he comes in as a mere volunteer, and he cannot by thus thrusting himself forward create any legal obligation on the part of the writer." This case was much more favorable for the plaintiff than the one at bar, for this letter seemed to contemplate the negotiation of the drafts at Rio de Janeiro with some third party.

The strictness with which parties assuming to act upon the faith of a guaranty have been held to its precise terms is illustrated in Barns v. Barrow, 61 N. Y. 39; s. c., 19 Am. Rep. 247, where it was decided that a guaranty running to a member of a firm for goods to be sold by him, did not inure to the benefit of the firm of which he was a member, although they delivered the goods described in the guaranty. See also the cases therein referred to.

We have thus seen that no cause of action accrued to the plaintiff upon the guaranty, for the reason that it is a special guaranty upon which the party addressed alone could act and acquire a cause of action. Some confusion has arisen in the consideration of this case from an omission to regard the obvious distinction existing between a cause of action accruing to the plaintiff in his own right upon the discount by them of such drafts, and one arising in favor of Bingham Bros, either prior to or simultaneous with such discount, of which the plaintiff now seeks to avail itself as their equitable assignee. Different considerations are required to support these different contracts. The court below reversed the judgment entered upon the report of the referee in favor of the defendants upon the grounds stated in the opinion as follows: "In the view insisted upon by the respondent the letter of credit in question in this case was a special letter of promise to Bingham Bros.

In that view it was a valid contract, for it would be so read by the law as to supply the consideration so far as necessary under the former statute of frauds. 'If you will draw on him I will guaranty that any draft you may draw on Mr. A. Feigelstock of our city will be paid at maturity,' or it would be regarded an original promise under the case of Gates v. McKee, 13 N. Y. 235, and the defendants held to the established construction of such instruments.''

The court here seems to imply that there are two grounds upon which the action could be maintained, viz.: Because the promise was an original as distinguished from a collateral one, and secondly, because a cause of action accrued to Bingham Bros. upon making the drafts in suit, and that cause of action passed to the plaintiff as their equitable assignee by the delivery of the letter to them, and their discount of the drafts. We do not think that either of these grounds can be sustained.

It is entirely immaterial whether this guaranty be regarded as an original or collateral contract. Both equally required a consideration to support them, and the distinction between them is important only as affected by the statute of frauds, a collateral contract to pay the debt of another being required by that statute to be in writing, while an original undertaking is valid even if made by parol. No question arises respecting the validity of this promise, except in regard to its want of consideration. If therefore we could call this an original undertaking, the promise having, as we have seen, been made to Bingham Bros. alone, it still lacks the indispensable requirement of a consideration to support it.

This consideration must be proved, and a presumption of its existence can no more be indulged in to support the action than the presumption of any other fact material to the existence of a cause of action. Commercial and business paper generally specifies a consideration upon its face, and a defense thereto on the ground of a want of consideration must be supported by affirmative proof of such fact, but when the paper itself does not state a consideration the omission must be supplied by affirmative proof on the part of the holder, or he cannot recover thereon. 1 Pars. Cont. 175. No consideration is referred to in this letter, and the drafts are the act of Bingham Bros. alone, and are evidence of no fact stated therein as against any one,

except the drawers. But even the drafts do not purport to be drawn for value.

In every aspect in which this transaction can be regarded Bingham Bros. appear as the makers of the drafts for their own accommodation, and as such personally liable to all who thereafter become parties thereto.

We have no difficulty in regarding the plaintiff as the equitable assignee of any cause of action existing against the defendants in favor of Bingham Bros. As has been already stated, if any such cause of action arose, it was assignable and must be considered to have passed to the plaintiff by the delivery of the guaranty and the payment by it of the proceeds of the drafts to Bingham Bros. It thereby became the equitable owner of such cause of action and of such an interest in the letter of credit as would enable it, under our Code, to maintain an action against the defendants. But the question is presented, did any such cause of action ever arise? We have been unable to discover any ground upon which such a claim can be plausibly sustained. The letter certainly contains no reference to any consideration received by its writers, and the proof shows none advanced by Feigelstock to them or by Bingham Bros. to either Feigelstock or the guarantors.

Upon the very face of the transaction Bingham Bros. drew their drafts for their own benefit and contemplated the acceptance by Feigelstock for their accommodation. Taking the strongest view against the defendants which the case is susceptible of, they occupied simply the position of proposed accommodation guarantors of the contemplated accommodation acceptor of Bingham Bros.' drafts; and it certainly cannot be claimed that they thereby incurred any liability to the party for whose accommodation they had guaranteed such obligations. Atkinson v. Manks, 1 Cow. 692; 1 Pars. Cont. 184; Thurman v. Van Brundt, 19 Barb. 409; Dan. Neg. Inst. § 189. Even if the letter of credit be read as paraphrased by the court below, it falls far short of establishing a consideration moving to the defendants.

It cannot be seriously claimed that a proposition, either written or oral, made by one person to another, agreeing to guarantee the payment of any draft which the other might draw, furnished a sufficient consideration for the promise. Such a request is implied in all accommodation papers as between the

parties thereto; and if this were held to import a sufficient consideration, it would destroy all distinctions between accommodation and genuine business obligations. But this letter of credit, as read by the court below, would not confer a cause of action upon third parties, even if it had been addressed to them, without proof that they had parted with value upon its faith. In all of the cases cited where guarantors have been held liable, even to third persons, upon such instruments, the letter embraces either an express or implied request to such persons to advance value upon the faith of the paper therein described, and it is because they have parted with value upon such request that the liability of the promisor to them is predicated. If no liability is incurred in favor of a third party unless he has parted with value, much less can it be claimed that it is in favor of an original party to the contract, from whom, as is shown affirmatively, no consideration whatever proceeded. We are therefore of the opinion that the plaintiff is not entitled to maintain this action.

The order of the General Term should be reversed, and the judgment rendered upon the report of the referee affirmed, with costs.

Order reversed and judgment affirmed.

Judgment affirmed.

All concur, except DANFORTH, J., not voting.

CRANE v. SPECHT. 1894.

39 Neb. 123; 57 N. W. Rep. 1015; 42 Am. St. Rep. 502.

Error from the district court of Douglas county. Tried below before Doane, J.

HARRISON, J. In this case, an action in the district court of Douglas county, Nebraska, the plaintiff the Crane Company, plaintiff in the court below and in this court, sought to recover of defendant Christian Specht a certain sum which it claimed due from defendant as guarantor of the account of one A. C. Lichtenberger to the Crane Bros. Manufacturing Company. The petition of plaintiff is as follows:

"The plaintiff in the above entitled cause, complaining of defendant therein, for a cause of action states that said plaintiff is a corporation duly organized under the laws of the state of Illinois; that on and prior to August 23, 1889, Crane Bros. Manufacturing Company was a corporation organized and doing business under the laws of the state of Illinois, and was engaged in the sale of plumbing and other materials in the city of Omaha, Nebraska. That prior to said August 23, 1889, said Crane Bros. Manufacturing Company had sold and furnished to one A. C. Lichtenberger goods and materials; that for said goods said Lichtenberger was indebted to said Crane Bros. Manufacturing Company, and at said date said Crane Bros. Manufacturing Company refused to furnish said Lichtenberger additional goods or material, unless the payment of the bill already incurred by him, and the payment of goods thereafter delivered, should be guarantied by some responsible party; that in consideration of Crane Bros. Manufacturing Company's selling additional goods to said Lichtenberger, said defendant Christian Specht executed his written guaranty, whereby he agreed to pay the indebtedness already incurred by said Lichtenberger with said Crane Bros. Manufacturing Company and the payment of all materials which said Lichtenberger should thereafter purchase of them; that thereafter said Crane Bros. Manufacturing Company, relying upon said guaranty, continued to sell and deliver to said Lichtenberger goods and materials,—a copy of said guaranty is hereto attached, marked Exhibit 'A,' and made a part of this petition; that afterwards the said plaintiff became incorporated and succeeded to the business and interests of said Crane Bros. Manufacturing Company and continued to carry on said business and to supply the customers of said Crane Bros. Manufacturing Company; that, relying upon said guaranty made by said Christian Specht to said Crane Bros. Manufacturing Company, said plaintiff sold and furnished said Lichtenberger goods and materials; that said sales made by plaintiff to said Lichtenberger were made with the knowledge and consent of said defendant and at his request, and with the knowledge and intention of said plaintiff and said defendant that said defendant should be liable to the said plaintiff for goods sold to said Lichtenberger under said guaranty to said Crane Bros. Manufacturing Company, and that said goods were furnished by said plaintiff relying upon said guar-

anty and at the request of said defendant that said goods should be so furnished; that a statement of said goods furnished by said Crane Bros. Manufacturing Company, and said plaintiff to said Lichtenberger in pursuance of said guaranty made by said defendant, is hereto attached, marked Exhibit 'B,' and made a part hereof; that on account of goods so furnished there remains now due said plaintiff the sum of eight hundred eighty-one dollars and ninety-nine cents ($881.99), which amount said Lichtenberger has failed and neglected to pay. Wherefore the plaintiff demands judgment against said defendant in the sum of one thousand dollars ($1,000), and the costs of suit."

The defendant answers the petition as follows:

"First. That he is not advised as to whether or not the plaintiff is a legal corporation, and cannot admit, and therefore denies the same.

"Second. The defendant, further answering, admits that the Crane Bros. Manufacturing Company sold and furnished to the said A. C. Lichtenberger on or about August 23, 1889, some goods and merchandise; and further admits that on the 23d day of August, 1889, he executed the guaranty mentioned in the petition, of which Exhibit 'A' is a copy.

"Third. This defendant, further answering, says that he is not advised as to whether or not the plaintiff succeeded to the business interests of Crane Bros. Manufacturing Company and continued to carry on said business and to supply the customers of said Crane Bros. Manufacturing Company, and cannot admit, and therefore denies the same.

"Fourth. The defendant, further answering, denies that the plaintiff sold and furnished said Lichtenberger goods and materials as alleged in said petition, and denies that said alleged sales were made to said Lichtenberger with the knowledge and consent of the plaintiff and at his request, and denies that the defendant requested the plaintiff to sell any goods whatever to said Lichtenberger, or ever in any manner whatever agree to become liable for the same, and denies that there is due the plaintiff the sum of $881 from said Lichtenberger, or any part thereof.

"And the said defendant, further answering, denies that he is indebted to the plaintiff in any sum whatever.

"Wherefore the defendant, having fully answered said petition, prays to be hence dismissed with his reasonable costs."

Exhibit "A," the contract of guaranty, attached to the petition and the foundation of this action, is as follows:

EXHIBIT "A."

Omaha, Neb., August 23, 1889.

"Messrs. Crane Bros. Manufacturing Company, City.

Gentlemen: I will guaranty the payment of your account against A. C. Lichtenberger, and for all materials he may purchase from this date. The above is to hold good until written notice is given you by me.

"Yours truly,

"C. Specht."

A jury was waived and trial had to the court. There was a finding and judgment in favor of defendant. Plaintiff filed a motion for new trial, which was argued and overruled, and the case was brought here by the plaintiff for review.

The evidence in the case discloses that on the 23d day of August, 1889, the defendant executed and delivered unto the Crane Bros. Manufacturing Company the guaranty in question (Exhibit "A"); that on or about January 20, 1890, the corporation, at an annual meeting of its stockholders then held, changed its name from Crane Bros. Manufacturing Company to Crane Company, no change or alteration whatever being at this time made in the officers, management, business, or location of place of business, and after such change continued to furnish goods and materials to Lichtenberger, for which goods and materials Lichtenberger failed to pay; that defendant Specht was requested to make a new guaranty to the Crane Company, but refused to do so, and never did execute such a guaranty; that the action is brought upon the account running through the whole time during which Lichtenberger purchased goods of the corporation, both under the old and the new name, for a balance due upon the account which is due for goods sold to Lichtenberger after the change in the name of the corporation.

The question raised by the bill of exceptions and strenuously argued by counsel is, can the Crane Company recover upon the contract of guaranty given by defendant to Crane Bros. Manufacturing Company? The attorneys for plaintiff contended that the Crane Company was organized on the 20th day of January, 1890, being the Crane Bros. Manufacturing Company under the new name, Crane Company; that it was composed of

the same persons, managed by the same officers, engaged in the same business and at the same location; that there was merely a change in the name, and no other or further change in the composition or operations of the company, and hence it was entitled to recover on this as well as other contracts to which the Crane Bros. Manufacturing Company was a party. The defendant's attorneys claim that the Crane Company cannot recover, by virtue of the guaranty given by defendant to the Crane Bros. Manufacturing Company, any sum due it for goods sold or furnished Lichtenberger after the change of its name to "Crane Company." The contention in the case resolves itself to the question, did the change in the name of the corporation deprive it of the right to recover, upon the contract of guaranty given to it by defendant in its former name, the price of goods furnished after the change in style to the party whose account was guarantied to it under the old name? The answer to this question will be most readily obtained, it seems to me, by an examination of the nature of the contract of guaranty and the construction to be given to it.

In 1 Brandt, Suretyship & Guaranty (2d Ed.), pp. 134 and 135, sec. 93, it is said, in discussing such contracts: "A rule never to be lost sight of in determining the liability of a surety or guarantor is, that he is a favorite of the law and has a right to stand upon the strict terms of his obligation, when such terms are ascertained. This is a rule universally recognized by the courts, and is applicable to every variety of circumstances." Again it is said: "A surety or guarantor usually derives no benefit from his contract. His object generally is to befriend the principal. * * * The guarantor is only liable because he has agreed to become so. He is bound by his agreement and nothing else. * * * It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being, then, bound by his agreement alone and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms or to permit it to be altered without his consent would be, not to enforce the contract made by him, but to make another for him."

In Miller v. Stewart, 9 Wheat. (U. S.) 680, STORY, J., says: "Nothing can be clearer, both upon principle and authority,

than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or even that it may be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal."

It being well settled that the foregoing are the rules of law by which such contracts as the one in the case at bar are governed and construed, I will pass now to some of the cases in which these rules have been particularly applied to the facts as developed in the cases, selecting such as are similar to the one under consideration and more or less directly in point.

In the case of Allison v. Rutledge, 5 Yerg. (Tenn.) 194, the defendant addressed a letter to "Mr. Allison," by which he became surety for the payment of the purchase price of some bacon purchased by one Cooper, and was sued on the instrument by John and Joseph Allison, as guarantor, for $100, the price of the bacon. CATRON, C. J., in delivering the opinion of the court, says: "Can, under any circumstances, a recovery be had in this action by force of the guaranty? It is addressed in the singular to Mr. Allison. Rutledge undertook for the debt of Cooper, is bound by the writing and this only. The contract cannot be varied or its meaning explained without violating the statute of frauds. He did not address himself to two Allisons, but to one. The paper, from its face, could not be given in evidence to sustain the joint action, and it could not be proved by parol that two were meant."

In the case of Smith v. Montgomery, 3 Tex. 199, the defendant Montgomery wrote and forwarded a letter of credit as follows:

"Colorado, Dec. 27, 1839.

"Col. Smith & Pilgrim—Gentlemen: Mr. A. W. Tennard wishes to get some dry goods on time. If you will furnish, I will see you paid as far as to the amount of ($3,000) three thousand dollars,

"And much oblige yours, with respect,

"JAMES S. MONTGOMERY."

This letter was addressed on the back to Smith alone. It

appears that Smith and Pilgrim had been partners in business, but a very short time prior to the date of the letter had dissolved the partnership. The letter being addressed on the back to Smith alone, was delivered to him and he supplied the goods to Tennard, who failed to pay for them, and Smith instituted the action to recover from Montgomery, as guarantor, the price of the goods to the amount of the guaranty. Mr. Justice WHEELER, in delivering the opinion of the court, says: "Upon consideration, we are all of the opinion that we must look to the address upon the face of the letter, and not to the direction upon the back of it, to ascertain the party to whom its application and promise were intended, by the writer, to have been made; that, bearing upon its face a direction and address full and complete, and free from ambiguity, we must take that as the certain criterion to determine its application without regard to the discrepancy in the superscription. If the letter did not bear upon its face the proper address, resort might be had to the superscription, or perhaps to other extrinsic evidence, if necessary, to determine its direction and application. (1 How., 169.) But when the contract upon its face is complete and perfect, and certain to every intent, as well in respect to the parties as the subject-matter, we do not think it admissible to resort to anything extrinsic to control the express terms and clear import of the face of the instrument. * * * It is a well settled rule, applicable to this class of cases, that the liability of a guarantor or surety cannot be extended by implication or otherwise beyond the actual terms of his engagement. It does not matter that a proposed alteration would even be for his benefit, for he has a right to stand upon the very terms of his agreement. The case must be brought strictly within the terms of the guaranty, when reasonably interpreted, or the guarantor will not be liable."

In the case of Evansville National Bank of Evansville, Ind., v. Kaufmann, 93 N. Y. 273, it is said: "It is always competent for a guarantor to limit his liability, either as to time, amount, or parties, by the terms of his contract, and if any such limitation be disregarded by the party who claims under it, the guarantor is not bound. It follows that no one can accept its propositions or acquire any advantage therefrom unless he is expressly referred to or necessarily embraced in the description of the persons to whom the offer of guaranty is addressed."

"Guarantor liable only to person to whom he makes the guaranty." (Second Nat. Bank of Peoria v. Diefendorf, 90 Ill. 396.)

A guarantor's engagement does not make him answerable for goods furnished by any other person than the one with whom the contract of guaranty is made. He is not answerable beyond the scope of his engagement. (Walsh v. Bailie, 10 Johns. (N. Y.) 179; Penoyer v. Watson, 16 Johns. (N. Y.) 99.)

"Where a letter of credit is addressed to a particular firm no one else can rely on it as a guaranty." (Taylor v. Wetmore, 10 Ohio 491.)

In Barnes v. Barrow, 61 N. Y. 39, it being a case in which, under a written contract of guaranty made with a particular person, a partnership of which that person was a member sought to recover the value of goods furnished the person for whose debt or default the guarantor stood charged to answer, it is said: "On the face of this contract it is plain that no one could act upon it, except the persons named in it." And Burge on Suretyship (ch. 3) is cited as follows: "The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed, or necessarily included, in it." And further it is stated: "In the Roman law the rule now under consideration assumes the form of a maxim: 'An agreement of guaranty made with one person cannot be extended to another person.'"

To the same effect as the above cases is that of Taylor v. McClung's Executor, 2 Houston (Del.), 24, cited by attorneys for defendant in error in their brief, and which is a case very much in point. Our own court has recognized the same principle in the case of Lee v. Hastings, 13 Neb. 508.

The case most directly in point is that of Grant v. Naylor, 4 Cranch (U. S.) 205. In this case John and Jeremiah Naylor brought an action against Daniel Grant on a letter or contract of guaranty which was addressed to John and Joseph Naylor. Chief Justice Marshall in the opinion in the case says: "That the letter was really designed for John and Jeremiah Naylor cannot be doubted, but the principles which require that the promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and a wise policy, which this court cannot relax so far as to except from its operation

cases within the principles. Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. * * * On examining the cases which have been cited at the bar, it does not appear to the court that they authorize the explanation of the contract which is attempted in this case. This is not a case of ambiguity. It is not an ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John & Joseph Naylor & Co., to either of which this letter might have been delivered. * * * In such a case the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make such a contract is going further than courts have ever gone, where the writing is itself a contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it."

In the case at bar the defendant Specht addressed the letter, or contract of guaranty sued upon, to the Crane Bros. Manufacturing Company, and not to the Crane Company. At the time the contract was entered into there was no such corporation in existence as the Crane Company. The contract of guaranty made by Specht was not in any manner for his own benefit, but to oblige, befriend, or aid Lichtenberger, and was such a contract as authorities uniformly hold will be strictly construed, and when not uncertain, indefinite, or ambiguous, will not be extended in any particular beyond the scope of its terms. On January 20, 1890, when the change of the name of the corporation from Crane Bros. Manufacturing Company to Crane Company was made there was no notice given defendant that such change had been made. The change could not and did not pass or transfer the right of the Crane Bros. Manufacturing Company to the Crane Company to furnish goods to Lichtenberger and rely upon the guaranty of Specht to answer for the debt or default of Lichtenberger. The goods, the value of which it is sought to recover in this action, were furnished to Lichtenberger after the Crane Bros. Manufacturing Company became the Crane Company, January 20, 1890, and this is not an action for the price of goods furnished by the Crane Bros. Manufacturing Company to Lichtenberger, which under certain

circumstances as to assignment, and possibly without, would be a different case and raise another point or question. The instrument containing the guaranty was plain, clear, and definite in its terms, and not in any particular ambiguous, and certainly not as to the person or corporation to whom or which it was addressed. It was a contract of guaranty to and with the Crane Bros. Manufacturing Company, and not the Crane Company, although the persons composing the first may have been identical with those of the second, and the introduction of the letter, showing as it does the guaranty to the Crane Bros. Manufacturing Company, was not competent to, and does not, support the action of the guaranty by the Crane Company, the plaintiff in this case, nor do I think that evidence could be received to show that the Crane Company had the same officers, and was, under the same management, engaged in the same business and in the same location as the Crane Bros. Manufacturing Company, or that it had the same stockholders and merely changed its name, or, if received, that it would alter or affect in any manner the relations or rights of the parties to the action. At the time the goods were furnished to Lichtenberger there was no Crane Bros. Manufacturing Company. It had ceased to exist or had become, by change of name, the Crane Company, and Specht could rely upon the exact terms of his contract and demand that his rights and liability be measured by the guaranty as written, signed, and delivered by him, to be bound only for goods furnished to Lichtenberger by the Crane Bros. Manufacturing Company as existing at the time the contract was made and by the name as set forth in his letter. The judgment of the lower court was right and is *Affirmed.*

FIRST COMMERCIAL BANK v. TALBERT. 1895.

103 Mich. 625; 61 N. W. Rep. 888; 50 Am. St. Rep. 385.

Montgomery, J. In 1884, Leroy Moore & Co., composed of Leroy Moore and defendant, James Talbert, were engaged in the banking business at Greenville, Michigan, and in June of that year closed their doors. At this time, the First National Bank of Pontiac held about fifty thousand dollars of commercial paper with the indorsement of Leroy Moore & Co. Mr.

John D. Norton, cashier of the First National Bank, had an interview with the defendant, Talbert, in which Mr. Norton stated to the defendant that the bank held this amount of paper, and should, for its protection, have some writing to hold the defendant, Talbert, on renewals. Subsequently, an authority in writing was sent to the bank in the following terms:

"Greenville, Mich., Sept. 15, 1884.

"John D. Norton, Cashier.

"Dear Sir: I hereby authorize Leroy Moore to use my name as one of the firm of Leroy Moore & Co. as indorsers on paper sent you for renewals.

"Very respectfully,

"JAMES TALBERT."

Among the paper held by the bank at the time of the suspension of Leroy Moore & Co. were notes amounting to upwards of five thousand dollars, signed by C. S. D. Harroun. The paper of Harroun was renewed from time to time, and reduced until the note in suit represents the unpaid portion of his paper. The present note was taken by the plaintiff, the First Commercial Bank. The First National Bank continued business until January 1, 1893, when the First Commercial Bank was organized under the state banking law, and the testimony tends to show that the only change was a reorganization, the First Commercial taking all the paper of the First National, and assuming all its liabilities, and having the same stockholders and the same officers and board of directors.

Three contentions were made by the defendant on the trial: 1. That the authority relied upon was not an authority to indorse the firm name of Leroy Moore & Co., but the name of James Talbert; 2. That the authority was to indorse paper held by the First National Bank only, and not paper held by the First Commercial Bank; 3. That the authority cannot be held to authorize repeated renewals, but must be limited to renewals of paper held by the bank on September 15, 1884, or, at the most, that defendant could not be held by renewals after such original paper would have outlawed. The circuit judge directed a verdict for the defendant, and plaintiff appeals.

1. We do not think the authorization open to the construction contended for by the defendant. It is suggested that, the authority being "to use my name," it should be construed as

authorizing Moore to sign the individual name of Talbert, and not the firm name. But we think it clear that the intent was to authorize the continuance of the use of the firm name. In no other way would the name of Talbert be signed as a member of the firm of Leroy Moore & Co.

2. Defendant also insists that, the authority being directed to John B. Norton as cashier of the First National Bank, the plaintiff could not act upon it, and charge the defendant; and cases are cited in which the guaranty of payment of obligations, to be in the future incurred, to a particular firm has been held not to bind the guarantor to meet obligations incurred by purchase made of another or different firm, even though the firm be the successor to the firm addressed. The case of Crane Co. v. Specht, 39 Neb. 123, 42 Am. St. Rep. 562, is a case of this character. There is much force in the contention of plaintiff, that the authorization in question is something more than a guaranty of payment, and is in the nature of a continuation of the partner's authority to bind the banking firm of Leroy Moore & Co. by indorsement, and that the instrument should not be construed with the same strictness as an ordinary guaranty, but more as in the nature of a continuation of the copartnership for the purpose of dealing with the paper then held by the bank. But, however this may be, we think that the First Commercial Bank is substantially identical with the First National. The state banking law (3 Howell's Statutes, Sec. 3208 b6) authorizes the reorganization of a national bank as a state bank. It provides: "Thereupon all assets, real and personal, of said dissolved national bank shall, by act of law, be vested in and become the property of such state bank, subject to all liabilities of said national bank not liquidated under the laws of the United States before such reorganization."

It was evidently under this statute that the reorganization was effected, as the testimony is, that the First Commercial took all the paper of the First National, and assumed all the liabilities, and had the same board of directors and stockholders at the time of it. In the well-considered case of City Nat. Bank v. Phelps, 97 N. Y. 44, 49 Am. Rep. 513, a question which we think is precisely analogous to the one here under consideration was considered. The court held that a national bank, which was a reorganization of a former state bank, retained its identity, so that a guaranty of payment made to the state bank could

be enforced by the reorganized national bank. It was said: "All property and rights which they held before organizing as national banks are continued to be vested in them under their new status. Great inconveniences might result if this saving of their existing assets did not include pending executory contracts and pending guaranties, as well as vested rights of property. Although, in form, their property and rights as state banks purport to be transferred to them in their new status as national banks, yet, in substance, there is no actual transfer from one body to another, but a continuation of the same body under a changed jurisdiction. As between it and those who have contracted with it, it retains its identity, notwithstanding its acceptance of the privilege of organizing under the national banking act."

3. Nor do we think that the authorization should be construed as limiting the authority to one to make the renewals of the particular notes then held by the bank. The statement should be construed with reference to the known situation of the parties, and the evident purpose with which it was executed, which very plainly was to invest Moore with a discretion to continue these renewals until the paper could be retired by collection.

The judgment will be reversed, and a new trial ordered.

The other justices concurred.

End

BARNS v. BARROW. 1874.

61 N. Y. 39; 19 Am. Rep. 247.

Appeal from an order of the General Term of the Supreme Court in the fourth judicial department, reversing a judgment in favor of defendant, entered on the report of a referee.

This action was upon a guaranty.

On the 20th of October, 1869, Edward F. Barrow entered into a written agreement with the plaintiff, John W. Barns, whereby Barns agreed to furnish Barrow flour and feed to be sold by the latter on commission, at prices to be designated by the former. Barrow was to account for the proceeds of sales, deducting his commissions. The defendant guaranteed, in writ-

ing, the performance of this agreement on the part of Edward F. Barrow. It appeared that the flour, etc., which was supplied under this agreement, did not belong to John W. Barns, but the firm of John W. Barns & Co., of which firm plaintiffs were the individual members, and that there was a balance of $600.51 due said firm from E. F. Barrow at the commencement of the action. It did not appear that either E. F. Barrow or the defendant knew that the goods supplied belonged to the copartnership.

The referee held as a matter of law that the plaintiffs could not recover against the defendant on the contract of guaranty.

DWIGHT, C. The single question in this case is, whether, under a written contract of guaranty, purporting to be made with a particular person, a firm, of which that person is a member, can recover the value of goods supplied to the person whose solvency was guaranteed, there being no evidence that the guarantor was made acquainted with the fact that the goods were to be supplied by the firm.

On the face of this contract, it is plain that no one could act upon it, except the persons named in it. The plaintiffs maintain that they can go behind the apparent transaction and show that they supplied the goods instead of John W. Barns. This claim is not one between the person who received the consideration and the plaintiffs. Were they seeking to collect of Edward F. Barrow, the purchaser, it might be claimed that the case was simply one of an undisclosed principal in the law of agency; and that parol evidence might be offered to show that John W. Barns was acting for the firm. This is the principle of such cases as Alexander v. Barker (2 Cromp. & Jer. 134); Cothay v. Fennell (10 B. & C. 671), cited in the court below. In Alexander v. Barker, there was a loan of money direct to the defendant, which was supplied by the plaintiff in his own name, though it belonged to a firm of which he was a member. The court held that the firm might recover, as it was their money. There was no element of guarantee in the case. In Cothay v. Fennell, three persons agreed to be jointly interested in the purchase of goods, which was, however, made in the name of one of them; it was held that all might recover for breach of contract.

The present case differs in an essential particular from those just cited. It is a case of pure guaranty; a contract which is said to be *strictissimi juris;* and one in which the guarantor is

entitled to a full disclosure of every point which would be likely to bear upon his disposition to enter into it. The consideration of the contract does not enure to him, but to another. He assumes the burden of a contract without sharing in its benefits. He has a right to prescribe the exact terms upon which he will enter into the obligation, and to insist on his discharge in case those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, this is not my contract, *non in haec foedera veni.* Accordingly, in the present case, he may say: "I contracted with John W. Barns, and will not be liable for supplies furnished by a firm, though he may be a member of it."

The authorities, when carefully considered, sustain this conclusion. Mr. Burge, in his work on Suretyship (chap. 3), discusses this subject at length. He says: "The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed, or necessarily included in it. It was in the power of the person accepting the surety to have expressed, and it is his own fault if he has not included the case to which he seeks to extend the liability of the surety" (p. 40). This last remark is peculiarly applicable to the case at bar, as Barns, with whom the defendant contracted, knew who the members of his firm were, and could readily have named them if he had seen fit. In the Roman law, the rule now under consideration assumes the form of a maxim: "An agreement of guarantee made with one person cannot be extended to another person." Some of the English cases which turn upon this principle are: Lord Arlington v. Merricke (2 Saund. 414); Wright v. Russell (2 W. Black. 934); Myers v. Edge (7 T. R. 254); Barker v. Parker (1 id. 287); Simson v. Cooke (1 Bing. 452); Strange v. Lee (3 East, 484); Spies v. Houston (4 Bligh (N. S.) 215); Dry v. Davy (10 Ad. & Ell. 30). The rules governing letters of credit depend upon the same doctrine. The whole subject is well illustrated by the case of Philip v. Melville (cited in Burge on Suretyship, p. 68). In that case, Melville recommended one Yetts to Dusie for a supply of spirits, and guaranteeing the payment. Dusie wrote on the back of the letter of credit an assurance to C. & J. Philip, plaintiffs, that, not having the article himself, he had sent Yetts with the letter

of credit, on which they might rely. They having furnished the spirits sued Melville. The court held, that a letter of credit addressed to a particular person is limited to him, and that the writer must be held to have granted it in reliance on his prudence and discretion in acting upon it; that such a letter contains no general power to interpose the writer's credit, or transmit his guarantee; and that this is specially to be observed where the general terms of the letter make the personal limitation the only restraint on the responsibility of the writer. The same principle is stated in Union Bank v. Coster (3 N. Y. 203); Birckhead v. Brown (5 Hill, 634; S. C., 2 Den. 375); Walsh v. Bailie (10 J. R. 180); Robbins v. Bingham (4 id. 476); Penoyer v. Watson (16 id. 100). In Walsh v. Bailie, A. gave a letter of credit to B., addressed to C. in Albany, requesting the latter to deliver goods to B. C. instead of delivering the goods himself, gave B. a letter to D., in Geneva, who supplied the goods. It was held that the engagement of A. to C. did not make him answerable for goods furnished by any other person, on the ground that surety is not answerable beyond the scope of his engagement. In Penoyer v. Watson, the facts were, that a letter of credit, in favor of A., was addressed to P. & Co. That firm having dissolved their partnership, P. acted on the letter. It was held that the guarantor was not liable.

It is conceded that none of the cases cited cover the case at bar in its precise terms. The theory on which they proceed, however, embraces it. As stated by SPENCER, J., in Penoyer v. Watson, the surety cannot be bound beyond the scope of his engagement. The sole question is: To what did he agree? And if he contracted with one person, as he had reason to suppose, no other person can be substituted in the place of the apparent contractee. On like grounds no person can be added to or subtracted from the apparent number. The words of the written instrument point out the person with whom he contracted and measure his liability, unless it be made to appear affirmatively, by legitimate evidence, that the guarantor intended to embrace others.

The court below, in holding the surety liable, laid stress on an extract from a section in Story on Partnership, the effect of which, we think was misapprehended. The passage is as follows: "If a contract of guarantee should be entered into apparently with one partner, but in reality it should be intended

for the indemnity of the firm, for advances to be made by the firm, an action might be maintained by all the partners, as upon a joint contract therewith, although the written papers containing the guarantee should be addressed to one partner, and he alone should conduct the negotiation;" citing Garrett v. Handley (3 B. & C. 463; S. C., 4 id. 664). It will be observed Justice STORY makes it a part of his supposition that the guarantee is intended for the indemnity of the firm, though apparently entered into toward one person. In the case cited by him evidence was produced at the trial which established that the guarantee was intended to be given for the joint benefit of the firm and not for that of the member solely to whom it was addressed. This evidence of special facts took the case out of the general rule, which would have otherwise governed it.

The case should be stated with some particularity. An action was first brought by Garrett, alone, against Handley. It appeared at the trial that the loan, on account of which the guarantee was given, did not belong to Garrett solely, but to himself in conjunction with two partners, and he was non-suited. A second action was brought by the partners, though the guarantee was addressed to Garrett alone. The plaintiffs, to show right of action, produced a correspondence between Bodenham, one of the partners, and the defendant, for the purpose of showing that the guarantee, though in terms given to Garrett, was intended for the benefit of the firm. On the part of the defendant it was urged, first, that the correspondence did not prove that the guarantee was intended for the benefit of the firm; and second, assuming that it did, still, that the action ought to have been brought in the name of Garrett, to whom the guarantee was in terms given. The court directed the case to stand over in order to read the correspondence. At a later day the judges said that they had perused the correspondence, and thought that it sufficiently appeared that the guarantee was intended for the benefit of the firm and not for Garrett alone, and that being so, they were of opinion that the action was properly brought in the name of the parties for whose benefit the contract was entered into. The reporter states the point of the decision to be, that an action may be maintained by the several partners of a firm, upon a guarantee given to one of them, if there be evidence that it was given for the benefit of all. The same principle was applied to the decision of Bateman v. Phillips (15 East, 272).

In that case a letter of guarantee was addressed to an attorney, and parol evidence was offered to show that it was intended for his client. Lord Ellenborough said that the parol evidence did not go to extend the terms of the agreement in writing; it only went to show that the letter was addressed to him as the attorney for the plaintiff and not as the principal and creditor of the debtor. These cases show in the clearest manner that the mere addressing of a guarantee to one, in the absence of parol evidence of intention, will not permit another to recover upon it.

That this was the interpretation put upon these cases by Judge Story is plainly shown by the language used by him in section 247 of the work already cited, where he remarks: "It never can be said with truth or justice that a guarantee or suretyship for advances to be made by A., B. & C. does properly extend to any advances made by A. or B., or by A., B. & D.; and therefore the guarantor or surety may with all good faith and correctness say, *non in haec foedera veni,*" citing, with approval, Strange v. Lee (3 East, 484, 490). In that case the guarantee reciting that B. intended to open a bank account with C., D. & E., as his bankers, was conditioned for payment to them of all sums from time to time advanced to B. at the said banking-house. It was held that on C.'s death such obligation ceased, and did not cover future advances made after another partner was taken in. Lord Ellenborough said: "The court will no doubt construe the words of the obligation according to the intent of the parties, to be collected from them; but the question is what that intent was. The defendant's obligation is, to pay all sums due to them, on account of their advances to Blyth. Now, who are 'them' but the persons before named? * * * The words will admit of no other meaning. * * * We are desired to construe our obligation to be answerable for money due to them (certain partners having been before named), to mean money due to any part of them; a construction which would be contrary to the words of the instrument." (Pp. 490, 491.) The only case appearing to lend color to the plaintiff's claim is Walton v. Dodson (3 Car. & Payne, 162). The case is briefly reported at *nisi prius,* and was decided shortly after Garrett v. Handley (*supra*). It is probably not inconsistent with it, but if so must be disregarded.

In the case at bar the defendant agreed that Edward F. Barrow should account to John W. Barns for goods received, and

should sell on commission for him, and be accountable for the proceeds, after deducting commissions to be allowed him by Barns. It is not possible, on any principle of construction established by the commentators and the cases cited, to add to the name of John W. Barns those of William and Charles Barns, his copartners, it not being made to appear that the defendant knew, at the time of the execution of the contract, that it was entered into by John W. Barns, not for himself merely but also for his copartners.

The order of the General Term should be reversed and the judgment entered upon the report of the referee should be affirmed, with costs.

All concur.

Order reversed, and judgment accordingly.

CHAPTER III.
PARTIES TO CONTRACT.

a. At common law a married woman not being able to contract of course could not become a surety and can do so now only when and to the extent that the statutes give her the power.

WARREY v. FORST. 1885.

102 Ind. 205; 26 N. E. Rep. 87.

Commissioners' decision. Appeal from circuit court, Noble county.

BICKNELL, C. C. The appellee brought this suit against the appellant to cancel her note and mortgage held by him. The complaint alleged that the plaintiff's husband owed the defendant $2,122, and that she without any consideration, at the request of the defendant, and as surety of her husband, joined her husband in executing said note, and, to secure the payment thereof, joined her husband in executing said mortgage upon her own separate land. The cause was tried by the court upon the complaint and the general denial. The court, at the request of the plaintiff, found the facts specially, in substance, as follows: (1) That on April 29, 1882, the plaintiff was, and still is, the wife of Jacob Forst, and on that day had, and still

has, the possession and legal title of said mortgaged land; (2) that on said day the plaintiff's husband owed the defendant $2,172.20, his own separate debt; (3) that on said day defendant verily believed that he had a valid claim against the plaintiff to subject said land to the payment of said debt, on the ground that, as he believed, said Jacob Forst, while so indebted to him, had bought and paid for said land, and had procured the conveyance thereof to the plaintiff, without consideration therefor, and with intent to defraud his creditors, and especially said defendant, and that defendant, so believing, had employed an attorney to commence an action in the Elkhart circuit court to subject said land to said claim. (4) That on said day the plaintiff, being informed of defendant's purpose to commence such suit, executed said note and mortgage for the purpose of avoiding such threatened litigation, and for the purpose of cancelling and paying her husband's said indebtedness, there being no other consideration therefor, and that said mortgage was duly recorded in Elkhart county on May 1, 1882. Upon the foregoing facts, the court stated the following conclusions of law: (1) That the contract of said plaintiff, in the execution of said note and mortgage, was a contract of suretyship, and that she executed both said note and mortgage as surety for said Jacob; (2) that said contracts of suretyship were and are void as to her, and that she is entitled to a decree declaring the cancellation of said note and said mortgage as to her. The defendant excepted to said conclusions of law, and excepted specially to the conclusion that said mortgage was void as to said plaintiff. The defendant then moved for judgment in his favor on the special findings. This motion was overruled. The defendant also moved for judgment in his favor as to the said mortgage, and that the same be declared valid and binding on the plaintiff, and this motion was overruled. The court then rendered judgment for the plaintiff in accordance with its conclusions of law. The defendant moved to modify the judgment, so as to declare said mortgage valid, and this motion was overruled. The defendant appealed from the judgment. He assigns several errors. We will consider those only which are discussed in his brief. The principal questions discussed arise upon the following specifications of error: (9) The court erred in its conclusions of law. (10) The court erred in overruling the appellant's motion for judgment on the special findings. (11) The court erred in overruling the appel-

lant's motion for a judgment affirming the validity of the mortgage. (14) The court erred in refusing to modify the judgment so as to affirm the validity of the mortgage.

Under an exception to conclusions of law, the facts specially found are deemed to have been correctly found. Dodge v. Pope, 93 Ind. 480. In the present case the special findings show that the plaintiff's husband was the debtor of the defendant, and that the plaintiff, for the purpose of avoiding a threatened litigation, and for the purpose of paying and cancelling her husband's indebtedness, executed the note and mortgage in controversy. She thereby undertook to become her husband's surety. The finding shows that she did this on the 29th day of April, 1882. At that time the statutes of 1881 were in force, and section 4 of the act of April 16, 1881, entitled "An act concerning husband and wife" (Acts 1881, p. 528, Rev. St. 1881, § 5119), is as follows: "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." This section forbids a married woman to become a surety for anybody. She may pay her husband's debts, but not by becoming surety therefor. It was held by this court, in Allen v. Davis, 101 Ind. 187, that where a married woman signs a note of her husband as surety, and they join in a mortgage of the wife's land to secure the payment of the note, she is not liable on either note or mortgage, the promise in the mortgage being no more binding on her than the promise in the note. To the same effect is the more recent case of Dodge v. Kinzy, 101 Ind. 102.

But the appellant claims that the conclusions of law are wrong, because the finding shows that the note and mortgage were executed not merely for the purpose of cancelling and paying the husband's debts, but also for the purpose of avoiding a threatened litigation. The finding is that the defendant believed that Jacob Forst, while indebted to him, had bought and paid for the mortgaged land, and had procured its conveyance to his wife, the plaintiff, without consideration, and with intent to defraud his creditors and the defendant; and that the defendant also believed that he had a valid claim against the plaintiff to reach said land, and subject it to the payment of said Jacob's indebtedness, and had employed an attorney to bring suit for that purpose, and had notified the plaintiff thereof, and that the plaintiff for the purpose of avoiding said

threatened litigation, and for the purpose of discharging her husband's debts, executed the note and mortgage. The appellant claims that the finding shows "a legal compromise of a doubtful claim or right," and that, therefore, there was a sufficient consideration moving from appellant to appellee, so that she was, in fact, not surety but principal in the execution of the note and mortgage. It was held in Fitzpatrick v. Papa, 89 Ind. 17, that "a married woman who executes a mortgage to secure the release of a valid lien cannot escape the consequences of her act upon the ground that the mortgage was executed to secure the debt of the husband. The benefit moves to her, for it relieves her property from a burden." In the present case, however, there was no valid lien made to appear. The finding does not show the compromise of any actually existing liability. It states only the belief of the defendant that he had a claim, without any fact upon which such belief is founded. It is not found that there was any valid claim against the plaintiff. It is not found that Jacob Forst was insolvent when the conveyance was made to his wife, the plaintiff, nor that the property was bought and paid for by him. It is not even found that the conveyance of the land to Mrs. Forst was caused to be made by her husband, nor that she paid nothing for it. The finding merely states the defendant's belief that such was the fact, without anything to warrant such belief. There is no fact found upon which even a doubtful claim could arise in favor of the defendant against the plaintiff. A threatened litigation, founded merely on the defendant's belief, without any fact to support the belief, amounts to nothing, and the purpose to avoid such a litigation was no consideration for the plaintiff's promises. In Jarvis v. Sutton, 3 Ind. 289, this court said: "It is true a compromise of doubtful claims may be sufficient to found a consideration upon, but in such cases there must be a surrender of some legal benefit which the other party might have retained. * * * A promise to give something for the compromise of a claim, about which there is merely a dispute and controversy, and for which there is no legal foundation whatever, is not sufficient to sustain a suit at law." In the case of Wade v. Simeon, 2 C. B. 548, the declaration alleged that the plaintiff had commenced an action against the defendant to recover certain moneys, and that in consideration that the plaintiff would forbear to proceed in that action until a certain day, the defendant promised that he would

on that day pay the amount, but he made default, etc. Plea, that the plaintiff never had any cause of action against the defendant in said action so commenced, which he, the plaintiff, at the commencement of said action, and thence until and at the time of the making of the promise, well knew. It was held, on demurrer, that this plea was sufficient. So, in Edwards v. Baugh, 11 Mees. & W. 641, the declaration alleged the existence of disputes and controversies between the parties as to whether or not the defendant was indebted to the plaintiff in £173 for money lent, and that the defendant, in consideration of the plaintiff's promise not to sue him at any time therefor, and to accept £100 in full satisfaction, promised the plaintiff to pay him the sum of £100 within a reasonable time. The court held that the declaration was bad, as not showing a sufficient consideration for the promise, there being no allegation of any debt actually due, but merely that a dispute and controversy existed respecting a claim which defendant believed to exist, but the actual existence of which was not averred. It is very clear that, if the finding in the present case had been merely that the wife executed the note and mortgage to pay her husband's debt, she would not have been liable thereupon. Allen v. Davis, *supra*, and Dodge v. Kinzy, *supra*.

And it may be conceded that if the finding had shown that the defendant had any lien on the wife's land, or if any facts had been stated in the finding showing that the defendant had any valid claim which might be enforced against the wife's interest in the land, in such a case the wife might be considered the principal, and the compromise of such a valid claim against her own land would be a sufficient consideration to bind her as principal, although it was also a part of the consideration to secure her husband's debt. But the finding under consideration states nothing at all as to the existence of such lien or claim against the wife's land. The statement is simply that the "defendant believed he had a valid claim against the plaintiff, and was threatening to bring suit upon it, and that, for the purpose of avoiding such threatened litigation, the note and mortgage were executed." If A were suing B on any verbal promise, it would not be sufficient to allege in the complaint that A believed he had a valid claim against B, and was threatening to sue him, and that thereupon, "for the purpose of avoiding such threatened litigation," B promised; such a complaint would be bad because,

instead of stating a consideration, it would merely state a motive. The complaint, to be good in such a case, must state an actual indebtedness of B to A, or facts showing a valid claim, and then a compromise thereof as the consideration of the promise sued on. So here, so far as the finding shows that the note and mortgage were executed for the purpose of avoiding a threatened litigation of a supposed claim, not found to have any real existence, it does not state any consideration. It simply states a motive. In Standley v. Insurance Co., 95 Ind. 254, ELLIOTT, J., said: "There is an essential difference between the motive which induces a party to enter into a contract, and the consideration yielded for its support. 'Motive,' said an English judge, 'is not the same thing with consideration,' Thomas v. Thomas, 2 Q. B. 851. In Philpot v. Gruninger, 14 Wall. 570, it was said: 'It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract, and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties.' To a like import is the decision in our own court of Clark v. Continental, etc., Co., 57 Ind. 135, where it was said: 'The motive prompting one to execute a contract, and the consideration of the contract, are entirely different things.' The motive which influenced the appellant to take out the policy was the desire to secure the loan, but this was not the consideration on which the contract of insurance rested. On the other hand, the desire to secure premiums on the policy influenced the appellee to make the loan, but this was not the consideration given for the note and mortgage. That consideration was the loan of money." The finding does not use the word "consideration." It states that the note and mortgage were executed "for the purpose of," but, if the word "purpose" means here the same as "consideration," then the finding states two considerations, one of them illegal, and the other insufficient. We think there was no error in the conclusions of law, nor in overruling the plaintiff's motions for judgment upon the findings, and for the modification of the judgment. The plaintiff really executed the note and mortgage to secure her husband's debt, and both note and mortgage were void as to her, under section 5119, Rev. St. 1881. As to the motion for a new trial, it is sufficient to say that there was evidence tending to sustain the findings. Therefore,

under the well-known rule of this court, they cannot be disturbed. The findings were not contrary to law.

The appellant says there was error in sustaining the demurrer to the first paragraph of his answer. That paragraph averred that Jacob Forst, the appellee's husband, was indebted to the defendant, and while so indebted bought and paid for the mortgaged land, and had it conveyed to the plaintiff, who paid nothing for it; that said Jacob thereby intended to defraud his creditors and the defendant, and that such fraudulent intention was at the time well known to the plaintiff; that, since the title was thus vested in his wife, said Jacob has not had any property subject to execution. There was no error in sustaining the demurrer to this paragraph of the answer. The paragraph confesses that the plaintiff was, as alleged in the complaint, the owner of the land, and mortgaged it as surety to secure her husband's debt. It contains nothing in avoidance. It seeks argumentatively to deny the complaint, by stating that the plaintiff has no title to the land because of fraud. If this could be shown at all, it would be admissible under the general denial, but it could not be given in evidence by the defendant against the plaintiff under any form of pleading. The appellant says in his brief that the same question arises on the ruling on the demurrer to the first paragraph of the answer, and on the exclusion of evidence of the matters therein set forth. The excluded evidence, however, sought to impeach the plaintiff's title for fraud, the defendant having recognized her title by taking a mortgage with notice. Conklin v. Smith, 7 Ind. 107; Rennick v. Bank, 8 Ohio, 529; Fitch v. Baldwin, 17 Johns. 161. The appellant says: "I admit that we are estopped from attacking her title on account of fraud, for the purpose of disturbing it, because, with knowledge of the fraud, we have treated with her concerning the subject-matter of it"; but he claims a right to show the fraud for the purpose of proving that she was a principal, and not a surety, in the execution of the note and mortgage. But we think that the defendant is estopped from proving the fraud, in this action, as against the plaintiff, for any purpose. There was no error in excluding the testimony now under consideration. We have now examined all the matters of alleged error discussed in the appellant's brief. We find no error in the record. The judgment ought to be affirmed.

Per Curiam. It is therefore ordered, on the foregoing

opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellant.

MITCHELL, C. J., took no part in the determination of this case.

HABENICHT v. RAWLS. 1885.

24 S. C. 461; 58 Am. Rep. 268.

Action on promissory notes. The opinion states the facts. The defendant had judgment below.

MCIVER, J. On January 24, 1883, the defendants, Rawls and Wilhalf, made the notes sued on payable to the plaintiff, and before their delivery to him they were indorsed by the other two defendants, Jennie Agnew then and now being a married woman. The notes were given in discharge of a lien held by the plaintiff on the stock of goods belonging to Rawls and Wilhalf. Mrs. Agnew had no interest in the stock of goods and received no consideration for her indorsement. She was therefore practically a mere surety for the debt of another; and the sole question raised by this appeal is whether she, being a married woman, was capable of making such a contract.

At common law there is no doubt that she had no such capacity, and therefore the inquiry is whether she has, by statute, been endowed with the power to make such a contract. That the act of 1870, incorporated in chapter C of the general statutes of 1872, page 482, section 3, did confer upon a married woman the power to make any contract which a feme sole could make, even to the extent of becoming surety for her husband, was settled by the cases of Pelzer v. Campbell, 15 S. C. 581, and Clinkscales v. Hall, 15 S. C. 602. But at the very next session of the general assembly, which convened only a very few days after the decisions in the cases just recited were rendered, the law which had been thus construed in those cases was altered so as to limit the power of a married woman to contract, and the question is as to the extent and effect of that limitation.

By the law, as it formerly stood, it was declared that "a married woman shall have the right * * * to contract and be contracted with in the same manner as if she were unmarried"; but by law as it stood at the date of the alleged contract here in

question, and still stands, it is declared that "a married woman shall have the right * * * to contract and be contracted with, 'as to her separate property,' in the same manner as if she were unmarried"; the five words quoted having been inserted as an amendment to the law as it formerly stood; so that the question raised by this appeal is narrowed down to the inquiry as to the effect of those five words. It seems to us that the most natural and the proper construction of the terms of this act, as amended, is that adopted by the Circuit judge; that the contract which a married woman is therein authorized to make is "as to her separate property, must have reference to her separate property, must concern her separate property."

It will be observed that the question is as to what contracts a married woman may make, and not as to their effect after they have been made. If a given contract is one that the law authorizes a married woman to make, then its effect is, and must necessarily be, the same as that of a contract of a person not laboring under any disability. It is very clear that the legislature intended to make some alteration in the law as it formerly stood, and we think it equally clear that the intention was to limit the power of a married woman as to the kind of contracts which she was permitted to make, *viz.:* to those in relation to her separate property. As we have seen, prior to the amendment a married woman could make any kind of contract which a person *sui juris* could make, and the intention undoubtedly was to alter this, and hence her general power to contract was qualified by the words constituting the amendment, so that, while formerly she had the unlimited power to contract, now she can only make contracts "as to her separate property."

We are unable to discover anything in the act which indicates that the intention of the legislature was simply to confine her liability on any contract, which she might choose to make, to her separate estate, as is contended for by appellant. There is nothing in the act which shows that the attention of the legislature was directed to the kind of property which could be held liable for the performance of a married woman's contract; and on the contrary, the language used shows that the legislative mind was directed to the kind of contract which she was to be permitted to make, and not to the kind of property which could be resorted to in case of a breach of the contract. Very recently, before the law was amended, it had been determined, as we have

seen, although there was no little contrariety of opinion upon the subject, as is well known, that a married woman had the same capacity to make any kind of contract as any other person, and the irresistible inference is that it was this that the legislature intended to alter, so as to confine the contracting power of a married woman to a certain class of contract, to-wit, those which were made as to her separate estate.

We are not aware that any controversy had arisen or any adjudication had been made as to the kind of property which could be made liable for the breach of a married woman's contract, and therefore, no occasion had arisen for an alteration of the law in that respect. Indeed we do not see how such a controversy could have arisen, for the old Code, as well as the Code of 1882, expressly provided that damages recovered against a married woman could only be collected out of her separate estate. Section 298 of the old Code, which is in this respect the same as section 296 of the amended Code, provides that "in an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise." And in section 310 of the old Code, the provision was that "an execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate estate and not otherwise"; and the same provision is found in section 307 of the present Code. So that it is very clear that the construction contended for by the appellant, to-wit, that the amendment now under consideration was simply designed to limit the liability of a married woman on her contracts to her separate estate, cannot be the correct one; for such a construction would make the amendment in question wholly unnecessary, as that was the law before.

We are therefore of opinion that the object of the amendment was not to indicate the kind of property which could be made liable for the breach of a married woman's contract, but to limit her right to contract, so that she could only make such contracts, as at the time they were made, related to or concerned her separate property. Hence, before a married woman can be made liable for the breach of a contract alleged to have been made by her, it must be made to appear, either from the inherent nature

of the contract or otherwise, that the contract was made in relation to or concerned her separate property. Even if she declares in express terms her intention to bind her separate estate, that alone will not be sufficient to render the contract valid, for the question is as to her power, which is to be determined by the nature of the contract itself, and not as to her intention to bind her separate property. If therefore a wife should sign a note as surety for her husband, or indeed for any other person, and should declare in the note in express terms her intention to bind her separate estate, that would not make the contract valid as to her unless it was made to appear that the contract, though executed by her as surety, was designed to benefit her separate property or in some other way related to or concerned such property.

We have not deemed it necessary to go into a consideration of the very numerous cases elsewhere upon questions similar to the one now before us; for while the statutes of the various States are somewhat like our own, yet they differ sometimes very materially in their phraseology, and in the very great conflict of authority abroad we have thought it more likely that we would reach a correct solution of the question by confining our attention to the terms of our statutes, viewed in the light of our own past legislation and adjudications.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

SIMPSON, C. J., concurred.

McGOWAN, J. I concur in the result. As the purpose of the act manifestly was to confer upon a married woman powers beyond what she possessed before, I cannot suppose that by the insertion of the words, "as to her separate estate," it was intended to defeat that object entirely as to contracts. The same act, in conformity to the Constitution, confers the powers "to bequeath, devise and convey her separate estate in the same manner and to the same extent as if she were unmarried," and in order to harmonize the different provisions I incline to think that the intention of the amendment was to limit the power of a married woman to such contracts as express an intention to bind her separate property, such as are made with express reference to, that is to say, "as to her separate property."

End

APPEAL OF FREEMAN. 1897.

68 Conn. 533; 37 Atl. Rep. 420; 37 L. R. A. 452; 57 Am. St. Rep. 112.

Case reserved from superior court, Hartford county; George W. Wheeler, Judge.

Appeal to the superior court by Edward A. Freeman, trustee of the estate of H. Drusilla Mitchell, insolvent, from an adjudication of commissioners allowing a claim against said estate by the First National Bank of Chicago, Ill. Reserved, on a finding of facts, for the advice of the supreme court. Disallowance of claim advised.

BALDWIN, J. Mrs. Mitchell, being a citizen of Connecticut, married a citizen of Connecticut in 1857, and they continued to reside in this state until his death. Her marriage gave her, under the laws of the state then in force, substantially the status which belonged to a married woman at common law. Her personal identity, from a juridical point of view, was merged in that of her husband. Thereafter, during coverture, she could make no contract that would be binding upon her, even by his express authority. 1 Swift's Dig. 30. If she assumed to make such a contract, it was absolutely void. These personal disabilities the common law imposed partly for the protection of the husband, and partly for that of the wife. To preserve what property rights remained to her, as far as might be, against his creditors, various statutes were from time to time enacted, until this long ago became recognized as the established policy of the state. Jackson v. Hubbard, 36 Conn. 10, 15. These statutes were mainly designed to protect her against others. The common law was sufficient to protect her against herself, and prior to 1877 it precluded her from making any contract as surety for her husband. Kilbourn v. Brown, 56 Conn. 149, 14 Atl. 784. A statute of that year establishes a different rule for women married after its enactment, but does not enlarge the rights of those previously married. Gen. St. § 2796.

Whenever a peculiar status is assigned by law to the members of any particular class of persons, affecting their general position in or with regard to the rest of the community, no one belonging to such class can vary by any contract the rights and liabilities incident to this status. Anson, Cont. 328. If he

could, his private agreements would outweigh the law of the land. *"Jus publicum privatorum pactis mutari non potest."* Coverture constitutes such a status, and one of its incidents in this state, at the time of Mrs. Mitchell's marriage, was a total disability to contract. So far as contracts of suretyship for their husbands are concerned, the disability of women married before 1877 remains absolute, unless both husband and wife have executed for public record a written contract, by which both accede to the provisions of the statute of that year, and accept the rights which it offers to them. Gen. St. § 2798. No such contract was ever executed by Mrs. Mitchell.

The claim in favor of the First National Bank of Chicago, which has been allowed by the commissioners on her estate, was founded on a debt due from a mercantile firm in Illinois, of which her husband was a member, for which she had assumed to make herself responsible, as guarantor, by a writing dated in Illinois, but signed in this state. The creditor had agreed, in Illinois, with the firm, to forbear suit if she and they (as a firm and individually) would become parties to such a paper, and, after they had signed it there, had given it to her husband, in Illinois, to take to her, in this state, for execution. He procured her signature, and then mailed the instrument to one of his partners at Chicago, by whom it was there delivered to the bank. The agreement of forbearance had been conditioned on the execution of the guaranty by the firm, its individual members, and Mrs. Mitchell. It was her credit only that was to give it value. Its execution by the others gave the bank nothing which it did not have as fully before. It did not become complete until it received her signature. It did not then become operative as a security until it had been delivered to the creditor. Her husband cannot be deemed to have acted, in procuring Mrs. Mitchell's signature, as the agent of the bank. No finding to that effect was made by the trial court, and no such agency is implied from the circumstances of the transaction. He had a direct interest in obtaining the desired extension of credit. He was a principal in the obligation. He sent the paper, as soon as it was completed, not to the bank, but to another of the principals. If he represented any one but himself, it was his co-partners. The delivery of the paper by his wife to him, therefore, after her signature had been attached, was not a delivery to the bank, but simply purported to give him authority, as her agent, to

make or procure such a delivery at some subsequent time. If, therefore, the guaranty, so far as concerns her obligation upon it, was ever delivered, it was delivered, and so first took effect, in Chicago. But its delivery there could not affect her, unless it was made by her or by her authorized agent. Morse, the partner who actually handed it to the bank, stood in no better position than her husband, whether regarded as the servant of the latter, or as a partner with him. In either case, the agency by virtue of which the delivery was made was created, if at all, in Connecticut. But to create an agency is to enter into a contractual relation. Mrs. Mitchell had no capacity to make any contract whereby her legal position in respect to all or any of the other members of the community would be varied. It would have varied it in respect to her husband could she have constituted him her agent to put her, by the delivery of an instrument of guaranty, in the situation of a surety for his debt to a third party. He therefore derived no authority from her to make the delivery to the bank, and, as to her, the instrument never was delivered. It is true that the guaranty, if a binding contract, was a contract made in Illinois. It might also be assumed, so far as concerns the law of this case (although this is a point as to which we express no opinion), that it was one to be performed in Illinois, and that, as to the principals in the transaction, it was fully an Illinois contract, and to be governed by the law of Illinois, as respects any question as to its validity. By that law, a married woman was free to enter into such an engagement, and to constitute an agent for that purpose. But the *lex loci contractus* is a rule of decision only when there is a contract, so made as to be subject to that law. It is a *petitio principii* to say that, because the guaranty was delivered in Chicago, it is therefore to be held effectual or ineffectual, as against Mrs. Mitchell, by the law of that place. The underlying question is, was it, as to her, ever delivered at all? It was not so delivered unless delivered by her authority; and by the laws of Connecticut, where she assumed to give such authority, she could not give it. Cooper v. Cooper, 13 App. Cas. 88, 99, 100; Story, Confl. Laws, §§ 64, 65, 66a, 136; Dicey, Confl. Laws, c. 18, rule 123.

Had Mrs. Mitchell been within the state of Illinois when she signed the guaranty, it may be that her personal presence would have so far made her a resident of that state as to subject her to

its laws in respect to acts done within its jurisdiction. But, as whatever was done in Illinois to bind her to the bank was done under an agency constituted in Connecticut, it is the law of Connecticut which must determine as to the authority of the agent, and so as to the validity of the obligation which he, as such, undertook to impose upon her by the delivery in Chicago of the paper signed by her in Bristol. The order drawn by Mrs. Mitchell on the executor of her father's will, directing him to pay over to the bank whatever might otherwise be coming to her as part of the estate in his hands, though dated at Chicago, was brought to her in behalf of the bank in Connecticut, signed and given back to the agent of the bank in Connecticut, accepted by the executor in Connecticut, and then mailed in Connecticut by its agent to the bank at Chicago. The whole transaction, therefore, was completed here. The order became operative, if at all, to transfer her interest in her father's estate, when the executor had notice of it, and agreed to comply with it by handing his written acceptance to the agent of the bank. That Mr. Mitchell was acting in that capacity seems clear from the finding that the bank, after the firm had become insolvent, and made an assignment for the benefit of its creditors, prepared the paper, and sent it to him, to procure her signature to it. No assignment which she could make would benefit the firm. If its result was to satisfy the claim of the bank, she would be subrogated to its place, and their creditors would receive no greater dividend. The order, also, was for the payment of a share in the estate of a deceased citizen of Connecticut, in course of settlement in its courts. Under these circumstances, its validity must be determined by the laws of Connecticut, and being dependent on the contractual act of a married woman, not for the benefit of herself, her family, or her estate, it was void. There have been cases not differing essentially in principle from that at bar, in which courts, to whose opinions great consideration is due, have come to conclusions varying from those which we have reached. The leading one is Milliken v. Pratt, 125 Mass. 374. There a guaranty by a married woman of such debts as her husband might thereafter contract was signed in Massachusetts, delivered there by her to him, and by him there mailed to the other party, in Maine. The court held that the contract became complete when the guaranty was received, and acted upon by the latter, and not before, and enforced it as one made and to

be performed in Maine, where married women then had power to enter into such agreements. No reference was made to the fact (which may, perhaps, have been immaterial under the laws of Massachusetts) that the delivery was made by the husband, acting as the agent of the wife,—a fact which, in our view, under the common law of Connecticut, is of controlling importance. Engagements which coverture prevents a woman from making herself she cannot make through the interposition of an agent, whom she assumes to constitute as such in the state of her domicile. If this were not so, the law could always be evaded by her appointment of an attorney to act for her in the execution of contracts. No principle of comity can require a state to lend the aid of its courts to enforce a security which rests on a transgression of its own law by one of its own citizens, committed within its own territory. Such was, in effect, the act by which Mrs. Mitchell undertook to do what she had no legal capacity to do, by making her husband her agent to deliver the guaranty to the bank. He had no more power to make it operative by delivery in Chicago to one of his creditors in Illinois than he would have had to make it operative by delivery here, had it been drawn in favor of one of his creditors in Connecticut. It is not the place of delivery that controls, but the power of delivery. The superior court is advised to disallow all and every part of the claim of the First National Bank. The other judges concurred.

HOLLOWAY'S ASSIGNEE v. RUDY. 1901.

22 Ky. Law Rep. 1406; 60 S. W. Rep. 650; 53 L. R. A. 353.

Appeal from circuit court, Henderson county.

Action by the assignee of H. S. Holloway against Marcy C. Rudy upon a contract. Judgment for defendant, and plaintiff appeals. Affirmed.

O'Rear, J. While appellee was a married woman, and before the enactment of our present married women's act, appellant H. S. Holloway, who was her kinsman, executed to the Planters' Bank a note for $2,500, and one to the Farmers' Bank for $900, as surety of appellee's husband. Appellant claims that he was induced to incur these liabilities by appellee's personal assur-

ances or promises of indemnity against loss, and that he would not have done so but for his reliance upon her agreement to keep him from loss on that account. The husband died in 1893, after appellant's liability had been assumed, and left an estate totally insolvent. After the husband's death appellee wrote appellant asking him to pay off the notes in question, and again promising to indemnify him against loss. Appellant did pay off these notes, because, he says, of this solicitation and promise. Appellee declining to comply with her agreement to repay the surety these sums paid by him, he sued her on the last-named or written promise to pay. Other allegations were contained in the petition, but were denied, and, there being a total failure of proof as to those that were denied, we are to determine whether the trial court's peremptory instruction to the jury to find for the defendant was proper. The determination of that question involves the one whether the promise of a married woman, made while under the disability of coverture, inducing another to become bound as the surety of her husband, is a sufficient consideration to support a promise of indemnity made to the surety after the removal of such disability.

It is argued for appellant that her original promise was based upon facts imposing upon her a moral obligation, and that although not legally binding because the law prohibited from legally binding herself, upon the law's restrictions being removed the original moral obligation was enough to support a new promise to pay. While formerly extensively held that moral obligation was a sufficient consideration to uphold a contract between competent parties, it has lately come to be denied, until it may now be seriously doubted whether the ancient rule longer obtains. Bish. Cont. 44, and cases cited; Pars. Cont. 432, 435, and notes. It has been held in this state that a moral obligation, where it has also been a legal one, might be the consideration of a new contract (Montgomery v. Lampton, 3 Metc. 520; Muir v. Gross, 10 B. Mon. 282); but we are not aware that the rule has been extended further, and, in the light of the trend of the later cases, we are disinclined to so extend it.

We have repeatedly held that the contract of a married woman, not with reference to her separate estate, and where not especially allowed by statute, was void, and that her subsequent promise to pay such an obligation, made after discoverture, was likewise void,—the first, because she was not competent to make

the contract; the second, because there was no consideration to support it. Robinson v. Robinson's Trustee, 11 Bush. 179; Jennings v. Grider, 2 Bush. 322; Russell v. Rice (Ky.), 44 S. W. 110; Chaney v. Flynn, 2 Ky. Law. Rep. 417; and others. We think the fair deduction from the foregoing line of decisions is that, without reference to what may have been the merit of the consideration of the original promise, the new contract, to be binding, must be based upon a new consideration, legal and sufficient of itself, and independent of the original one. That the surety paid off these notes upon the faith of the appellee's letter was not such new consideration; for he assumed no new condition, and did nothing he was not already legally bound to do. It follows that the giving of the peremptory instruction was proper, and the judgment is therefore affirmed.

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b. A corporation cannot become a surety unless authorized by its articles of incorporation to do so, or the contract relates to its corporate business.

KNICKERBOCKER v. WILCOX. 1890.

83 Mich. 200; 47 N. W. Rep. 123; 21 Am. St. Rep. 595.

CAHILL, J. This was an action of assumpsit brought to recover upon a written undertaking to indemnify the plaintiff against all harm by reason of his signing a replevin bond with Bellman and Handy in a suit brought by them against Naomi Warner, at Elkhart, Indiana. The following is the undertaking sued on:

"John Cox, President. Henry Hall, Vice-President. L. T. Wilcox, Cashier. E. E. Wilcox, Asst. Cashier.

"Established 1872. Reorganized 1884.

"Three Rivers National Bank.

"Three Rivers, Mich., Oct. 11, 1886.

"W. H. Knickerbocker, Cashier, Elkhart, Indiana.

"Dear Sir,—A replevin suit has been commenced in your county by Bellman and Handy, of this place, against Naomi Warner, of your place. They (B. & H.), being non-residents, are required to give bonds. They are good customers of ours, and if you will sign said bond, we will stand between you and all harm. L. T. WILCOX, Cashier."

Defendant pleaded the general issue, and gave notice that it would be shown on the trial that the defendant did not, in any way, individually enter into the contract alleged in plaintiff's declaration; and also that if he ever did, either individually, personally, or as the agent or in behalf of another, enter into such contract, the conditions of the same had been fully satisfied and performed.

It is claimed by the plaintiff that on the strength of defendant's letter he signed the replevin bond as requested, as surety for Bellman and Handy, and that the same was delivered to the sheriff, who thereupon delivered the property taken under the writ to Bellman and Handy; that the replevin suit came on for trial in the Elkhart circuit court, and Bellman and Handy were defeated. The defendant elected to take a judgment for a return of the property. To satisfy such judgment, the same was returned to her. Nevertheless, she insisted that certain goods were not returned, and that other goods were returned in a damaged condition, and she brought suit upon the replevin bond in the Elkhart circuit court against Bellman and Handy as principals, and Knickerbocker as surety, to recover such damages. Bellman and Handy and Knickerbocker each employed Mr. Van Fleet as attorney to defend that action. There is no legal evidence in the record that Mr. Wilcox had notice of this suit, or opportunity to defend it. Upon the trial of this suit on the replevin bond, Mrs. Warner, the plaintiff, recovered a verdict for $107.50, and costs. The court, on motion of defendants, granted a new trial, and when the same was about to come on for a second trial, Mr. Van Fleet, being of the opinion that it would be cheaper and better for his clients to compromise the suit than to try it, took the responsibility to effect a settlement, and for that purpose consented that Mrs. Warner might take a judgment against his clients for fifty dollars, and costs of the first trial. At this time, neither Bellman, Handy, nor Knickerbocker was present in court, or had any knowledge of such proposed settlement. But Bellman and Handy were at once notified of the same, and upon their objecting to such judgment, were informed by their attorney, Mr. Van Fleet, that Mrs. Warner was also dissatisfied, and that her attorney would consent to set aside the judgment and have a new trial, and that they could employ other counsel if they wished. This offer was not accepted, and the judgment of $50, and costs, was allowed

to stand, and the plaintiff, Knickerbocker, paid the same, on January 18, 1888, amounting in all to $183.75.

Afterwards, Mr. Van Fleet presented a bill to Bellman and Handy for his services in the defense of the suit on the replevin bond. They refused to pay it, and he commenced suit in the Elkhart circuit court against Mr. Knickerbocker for the same bill. Thereupon Mr. Knickerbocker notified Mr. Wilcox personally of the fact that he had been sued, and that it was necessary for him to appear and defend. To this notice Mr. Wilcox paid no attention. In that suit a judgment was recovered by Mr. Van Fleet against Mr. Knickerbocker for $150 damages and $10.50 costs, which Mr. Knickerbocker afterwards paid. After the payment of these two judgments, Mr. Knickerbocker called upon Mr. Wilcox to make good his agreement and save him harmless by reason thereof. This Mr. Wilcox refused to do, and this action was brought.

Upon the trial, the plaintiff offered in evidence the letter written by Mr. Wilcox to him, October 11, 1886, upon the strength of which he claimed to have signed the replevin bond. This was objected to by defendant, upon the ground that it was not the undertaking of the defendant, but it appeared upon its face to be the undertaking of the Three Rivers National Bank, of which Mr. Wilcox was cashier. The objection was overruled, and the letter admitted.

Plaintiff also offered in evidence transcripts of the two judgments rendered against him in the Elkhart circuit court, and which he claimed he had been compelled to pay. These were objected to by the defendant upon the ground that it did not appear from any evidence in the case that the plaintiff had signed any replevin bond, as requested by defendant, and that it was incumbent upon the plaintiff to show the original of such bond, and that the plaintiff had in fact executed the same. The original of the replevin bond was not produced nor offered in evidence upon the trial. But what purported to be a copy of such bond, found in the transcript of the suit brought on the replevin bond, was offered, together with evidence by Mr. Knickerbocker and Mr. Van Fleet that the same was a true copy of the original bond. It was not shown that the original bond was lost, nor was the failure to produce it accounted for, otherwise than by evidence that it was delivered originally to the sheriff in Indiana, and sued on by Mrs. Warner in that state.

The defendant was allowed, on cross-examination of plaintiff's witnesses, to interrogate them in relation to facts having a tendency to impeach the judgments, upon the ground that they were collusive and fraudulent as to Wilcox. This was objected to by plaintiff's counsel, and error is assigned upon this ruling.

When the plaintiff had rested his case, the court, on motion of the defendant's counsel, instructed the jury to render a verdict for defendant. Error is assigned upon this ruling.

It does not appear upon what ground this instruction was given. It is defended by counsel for defendant upon the ground, first, that the alleged guaranty was not and did not purport to be the individual guaranty of the defendant, Wilcox; that he was acting for the Three Rivers National Bank, in his official capacity as cashier. Undoubtedly, if the paper in question had been a note or bill of exchange, or any other instrument which it was clearly within the power of the cashier to make for the bank, no question could be raised as to its being the contract of the bank. But in this case the paper relied on shows on its face that it was given in the course of a transaction which the bank could not lawfully enter into. National banks possess only such powers as are expressly conferred upon them by the act of Congress under which they are organized, and no power is given them to enter into contracts of suretyship in which they have no interest: U. S. R. S., sec. 5136; Bullard v. National Eagle Bank, 18 Wall. 589; Matthews v. Skinker, 62 Mo. 329; 21 Am. Rep. 425; Wiley v. First Nat. Bank, 47 Vt. 546, 19 Am. Rep. 122; First Nat. Bank v. Hoch, 89 Pa. St. 324, 33 Am. Rep. 769. This rule of law must be presumed equally well known to both parties.

The paper not being the contract of the bank, then can it be said to be the contract of Wilcox himself? Does it, upon its face, appear so clearly to have been intended as the undertaking of the bank, executed through Wilcox as its cashier and agent, as to bring it within the rule that his want of authority to bind the bank, for which he assumed to act, does not render him individually liable, when the facts and circumstances indicate that no such liability was intended by either of the parties? In deciding this question, weight must be given to the argument that the writing of this letter will not lightly be assumed to have been a mere idle ceremony. We must assume that the parties to it intended it to have some effect. The cases in Missouri

(Michael v. Jones, 84 Mo. 578; Humphrey v. Jones, 71 Mo. 62; and Western Cement Co. v. Jones, 8 Mo. App. 373), relied on by counsel for defendant, were all cases in which the guardian of an insane person had traded with his ward's estate, contrary to the provisions of law, and had suffered losses. The persons dealing with him had done so with full knowledge of the fact that he was acting, not for himself, but for his ward. It was held that where the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent.

We cannot apply that rule to this case, for the reason that it does not clearly and unequivocally appear that Wilcox was claiming to act for the bank, and that he was not intending to bind himself. To say that he intended to bind the bank is to suppose him ignorant of the plain rules of law governing the institution of which he was a principal officer. There are many cases in which it has been held that the addition to one's signature of his title does not make the paper the contract of the corporation in which he is an officer. Such designation has been treated as a mere description of the person; Tilden v. Barnard, 43 Mich. 376, 38 Am. Rep. 197; Hayes v. Brubaker, 65 Ind. 27.

The second argument advanced in support of the judgment is, that there was no proof in the case that the plaintiff signed the replevin bond as he alleged in his declaration. I think this point is without force. The judgment record in the suit brought upon the replevin bond shows a copy of the bond set out at length in the complaint, as the only cause of action relied on. It will be presumed in support of such judgment that it was rendered after due proof of the execution of the bond declared on. For the purpose of identifying the judgment as rendered upon the bond signed by plaintiff at defendant's request, parol testimony was admissible. I think, also, a foundation was laid for the admission of secondary evidence of the execution of the bond. It was never in the possession of the plaintiff. It was delivered in the first instance to the sheriff at Elkhart, Indiana, and by him assigned to Mrs. Warner, who brought suit on it in that state. Presumably, therefore, it was out of the jurisdiction of the courts of this state, and secondary evidence of its contents was admissible. Woods v. Burke, 67 Mich. 674.

As the case must go back for a new trial, I think it proper to

say that the Indiana judgments, while *prima facie* evidence of the amount which the defendant is liable to pay to indemnify the plaintiff, are not conclusive upon him. He had no notice of the pendency of the first suit, and the judgment in that suit was finally entered by consent. It is open to him to impeach the good faith of this transaction if he can do so. If Mr. Knickerbocker employed counsel in good faith to defend that action, it was proper for him to do so, and any expense incurred by him in such defense was incurred for the benefit of Wilcox, as well as himself, and Wilcox would be liable to indemnify him against such payment. Of the suit brought by Mr. Van Fleet against Mr. Knickerbocker for counsel fees, Mr. Wilcox had due notice, and was asked to defend. Having declined to do so, we think he is bound by the judgment, unless it appear that it was rendered under such circumstances of collusion between the parties as would amount to a fraud upon Wilcox.

The circuit judge was wrong in directing a verdict for the defendant, and the judgment must be reversed, and a new trial granted.

LUCAS v. WHITE LINE TRANSFER CO. 1886.

70 Iowa 541; 30 N. W. Rep. 771; 59 Am. Rep. 449.

Action by co-surety for contribution. The opinion states the case. The plaintiff had judgment below.

Rothrock, J. I. The petition shows that the Valley National Bank and White Line Transfer Company are corporations organized under the laws of Iowa; that for the purpose of securing to the Philip Best Brewing Company payment for such beer as Leach & McCullum should purchase of said brewing company, said bank by its cashier and said transfer company by its secretary, J. O. Perrin, became sureties for said Leach & McCullum in a bond for $1,500 made to said brewing company as obligees; that subsequently the said Leach & McCullum failed in business, and refused to pay their indebtedness to the brewing company, and on May 27, 1884, executed their note to the said bank and transfer company, payable on demand, and in consideration of the payees therein assuming to pay $1,500 to

said brewing company; that on May 28, 1884, the following letter was directed to and accepted by the brewing company:

"Philip Best Brewing Company, Milwaukee, Wis.:

"Dear Sir—By an arrangement with Leach & McCullum, and in view of the fact that we were sureties to you for them, we have assumed $1,500 (the measure of our obligations as sureties) of their indebtedness to you.

"Very respectfully, etc.,
"W. D. LUCAS, Cashier,
"White Line Transfer Co.
"P. J. MILLS, President."

That on the 30th day of September, 1884, the brewing company made demand for the sum of $1,500, and interest, and plaintiff, after requesting the transfer company to pay its half thereof, and its refusing to do so, paid to said brewing company, "on said suretyship," the sum of $1,572.51; that on the 28th day of May, 1884, suit in attachment was brought in the name of plaintiff and defendant, and against Leach & McCullum, on the said note, dated May 27, 1884, and judgment recovered thereon; that the amount paid to the brewing company exceeds the amount realized from the attachment proceedings by the sum of $1,267.79; that the interest thereon is $35.56, making a total of $1,303.35; that general execution was issued in the judgment against Leach & McCullum, and returned *nulla bona*. Wherefore the plaintiff claims that the transfer company, as co-surety in the said bond, should contribute one-half the last-named sum, being $651.67, and asks judgment therefor.

The plaintiff attached to the petition a copy of the bond to the brewing company, signed by the firm and individual names of Leach & McCullum, and also signed: "W. D. Lucas, Cashier, White Line Transfer Co. J. O. Perrin, Secretary." There are also attached copies of attachment, and indemnifying bonds given in the attachment proceedings, signed by Lucas, cashier, and the transfer company, as above, and also copies of pleadings and stipulations in said attachment proceedings, signed by attorneys purporting to act for both the bank and the transfer company, who were joined as plaintiffs in said attachment proceedings.

The White Line Transfer Company, defendant, filed an answer, stating, in substance, that the sole object of its organization was to engage in the "general freight and transfer busi-

ness"; that it had no power or authority to become surety for the debt of another; that the secretary of said company, in signing the name of the defendant to the bond given to the brewing company, and the president of the company, in signing the name of defendant to the letter of May 28, 1884, did so without authority from the directors or stockholders of the defendant, and without the knowledge, on the part of many of them, that such signatures had been or were to be made; that the note executed by Leach and McCullum, dated May 27, 1884, payable to plaintiff and defendant, was so taken by plaintiff without any knowledge on the part of the defendant's officers or stockholders until some time after said note was in the possession of the plaintiff, and that the attachment suit and proceedings based on said note were commenced and carried on without the knowledge of a large number of defendant's stockholders, who had a large share of the stock. The answer further states that the company never received, directly or indirectly, anything for signing said bond or letter, or on account of said attachment proceedings; that neither itself nor its officers had any authority to sign the contracts, or do the acts alleged in plaintiff's petition; and that said contracts were and are *ultra vires*. To the answer was attached a copy of defendant's articles of incorporation, in which appears the following article: "(3) Object. Said corporation shall have power to engage in the general freight and transfer business and such other business as may not be inconsistent therewith."

To this answer the plaintiff filed a demurrer, on the ground that by reason of the matters set out in the petition, and exhibits thereto, and by reason of the taking of said note in favor of plaintiff and defendant, and the proceedings therein, as set forth, defendant was estopped from setting up the plea of *ultra vires*, and that the fact that some of the stockholders did not know of the proceedings would not relieve the defendant from liability.

P. J. Mills and J. O. Perrin being made parties defendant, each demurred to the petition on the ground that on the face of the petition itself it appeared that they had not signed any of the obligations as individuals, and that the petition itself made no personal claim against them.

The court below sustained the demurrer to the answer, and rendered judgment in favor of plaintiff, on default for want of

answer, for the sum of $628.02, and interest. From this ruling and judgment the defendant appeals. The court also sustained the demurrers of J. O. Perrin and P. J. Mills, and from this ruling the plaintiff appeals.

As to the last ruling, we think the Circuit Court should be sustained, as the petition does not state, nor attempt to state, a cause of action against Perrin and Mills as individuals.

II. The principal question involved in the appeal is the ruling on the demurrer interposed by plaintiff against defendant's answer. It is true, the demurrer seems to be based on the idea solely, that by the conduct of the defendant subsequent to signing the original bond, it has estopped itself from setting up the plea of want of power or authority to sign the bond. The two following propositions are proper to be considered: 1. Had the officers of the defendant power to bind the corporation by placing its name on the bond in question? 2. If they had no such power, has the corporation, or its officers, so acted in relation thereto subsequently as to prevent or estop the corporation from now setting up the plea of want of power?

The corporation defendant is acting under the general incorporation laws of the State, and from the provisions of its articles and the statute it derives its power. A corporation exists and exercises its franchise only by virtue of a grant from the legislative power. The granting and acceptance of a charter in the case of private corporations for pecuniary profit are based on the theory that the prosecution of the business proposed will be a benefit to the public, and that the investment of capital therein will result in pecuniary profit to the stockholders, and that it is an undertaking, on the part of the corporation and all of its stockholders, that in consideration of the grant of power, the capital shall be used for the prosecution of the purpose named in the charter, and no other. There is also an undertaking on the part of the corporation with each stockholder that the capital he invests shall be put to no other use, and subject to no other hazard, than that contemplated by the powers expressed in the charter, and that those things which are within the scope or object of the corporation shall be done in the manner pointed out in the charter and the laws governing its action. But corporations and their officers do not always keep within their powers, and the application of the doctrine of *ultra vires* is often attended with very perplexing questions.

By the application of a few plain rules, however, we may readily reach the proper answer to the questions involved in the case.

1. Every person dealing with a corporation is charged with knowledge of its powers as set out in its recorded articles of incorporation.

2. Where a corporation exercises powers not given by its charter, it violates the law of its organization, and may be proceeded against by the State, through its attorney general, as provided by the statute, and the unanimous consent of all the stockholders cannot make illegal acts valid. The State has the right to interfere in such case.

3. Where a third party makes with the officers of a corporation an illegal contract beyond the powers of the corporation, as shown by its charter, such third party cannot recover, because he acts with knowledge that the officers have exceeded their power, and between him and the corporation or its stockholders no amount of ratification by those authorized to make the contract will make it valid.

4. Where the officers of a corporation make a contract with third parties in regard to matters apparently within their corporate powers, but which upon the proof of extrinsic facts (of which such parties had notice), lie beyond their powers, the corporation must be held, unless it may avoid liability by taking timely steps to prevent loss or damage to such third parties; for in such cases the third party is innocent, and the corporation or stockholders less innocent for having selected officers not worthy of the trust reposed in them.

5. This class of cases may be illustrated by that where the officers of a corporation, empowered to build and operate a certain line of railroad, purchase iron to be used for another line, without the knowledge of the vendee. So in case of Humphrey v. Patrons' Mercantile Association, 50 Iowa 607, the debts of the corporation were, by its articles, limited to a certain amount, but the officers of the association, in dealing with Humphrey, exceeded that amount without his knowledge, or means of knowledge, and the corporation was held. Thompson v. Lambert, 44 Iowa 239, belongs to the same class of cases, with the addition that in the last case the stockholders, who objected to what they termed an *ultra vires* contract, were charged with knowledge of and participation in the act they claimed to be illegal, and were in no situation to complain. A corporation cannot retain ben-

efits derived from an *ultra vires* contract, and at the same time treat the contract as entirely void, unless perhaps in cases where the other party has assisted willfully in putting it beyond the power of the corporation to return what is received on such contract.

6. Where the corporation has permitted its officers to engage in *ultra vires* transactions, and in the prosecution of such transactions the officers commit a wrong or tortious act without the fault of the injured party, the corporation is estopped from taking advantage of the *ultra vires* character of the original undertaking.

These rules do not cover all cases, but are sufficient to guide us in the determination of the question of this case.

The case of Bissell v. Michigan Southern & N. I. R. Co., 22 N. Y. 258, is relied upon by appellee as authority for holding corporations on *ultra vires* contracts. It is true that the opinion of COMSTOCK, J., in that case, appears not to be in accord with the well-established doctrine of *ultra vires* as applied to corporations, but he says (page 275): "I do not deny the validity of this excuse in many cases, I may say in all cases where it can be received without doing great injustice to others. If the person dealing with a corporation knows of the wrong done or contemplated, and he cannot show the acquiescence of the shareholder, he ought not to complain if he cannot enforce the contract. Aside from the law of corporations, agreements which involve or propose a violation of trust will not be enforced by the courts where no greater equities demand it." In that case the defendants had constructed a railroad not authorized by their charter, and for some years had been operating the same, and made a contract to carry plaintiff over the road. He was injured in a collision occasioned by the negligence of defendants' employees. The plaintiff's cause of action did not arise out of the *ultra vires* contract to carry him, but out of the wrong done on the way, and to which wrong he was not a contributing party. This view is consistent with the sixth proposition above, and is the one in which SHELDON, J., sustained the right of recovery in a very able opinion in the same case, and certainly in line with well-established authorities, and in support of the doctrine of *ultra vires*. None of the other judges sustained the views of COMSTOCK, J., but all except Denio sustained the right of recovery. A different question would have been presented in

that case if the plaintiff had sued to recover for failure of defendants to transport him according to agreement.

In the case now before us the plaintiff seeks to recover contribution from the corporation as co-surety on the bond of the brewing company, and claims (1) that the contract of suretyship was within the defendant's corporate powers, and (2) that if it were not within defendant's corporate powers, it has so acted on the contract as to now estop it from pleading *ultra vires.* It is claimed that the language of the articles of incorporation, defining its business to be "the general freight and transfer business, and such other business as may not be inconsistent therewith," is of such a general character as to cover almost any kind of business. This position, it seems to us, is not tenable, for the language itself implies that there may be business inconsistent with the general freight and transfer business. The name of the corporation indicated its principal business, and the language is equivalent to saying it may do such other business as is consistent with the freight and transfer business. "Consistent" means standing together, or in agreement with. If the capital of the company is diverted into some other line of business entirely foreign to the freight and transfer business, it would be to the detriment of, and therefore not consistent with the latter. But whatever meaning may be attached to the language of the articles, it is quite certain it cannot include the contract of suretyship in question. The simple act of going security for another is out of the line of the prosecution of any business. It is a mere accommodation, and it cannot be assumed that the articles gave the officers of defendant any power to jeopardize its capital in any such venture.

"It is no part of the ordinary business of commercial corporations, and *a fortiori,* still less so of non-commercial corporations, to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are *ultra vires,* whether in the indirect form of going on accommodation bills, or otherwise becoming liable for the debts of others. Green's Brice Ultra Vires, 252; Madison, etc., Plankroad Co. v. Watertown, etc., Plankroad Co., 7 Wis. 59.

It seems to us clear that the corporation defendant had no power to make the contract of suretyship in question, and for the same reasons, it is just as clear that the officers of the cor-

poration had no power to sign the letter of May 27, purporting to assume the payment of the amount stipulated in the bond. Both instruments, so far as the defendant was concerned, were illegal and void, and no attempted ratification by parties having no power to make the original contract could make it valid, no matter how often such attempts were made. It is questionable on the authorities whether even the consent of all the stockholders could make the contract valid, when it was so plainly beyond the powers granted by their corporation, which was in duty to the legislative authority, held to apply its capital to the prosecution of the business for which it was organized and for which it received the grant of power. But this we need not determine. It is very clear however on authority and on principle, that there could not be a ratification without the consent of all the stockholders.

It appears from the record that the note sued on in attachment proceedings, and the proceedings themselves, were taken and carried through without the knowledge or assent of the stockholders or directors, and that the corporation defendant received no benefit therefrom, for whatever was realized therein was applied on the contract of suretyship, which was void as against the defendant, and was so applied by plaintiff or other unauthorized parties. Tracy v. Guthrie Co. Agr'l Soc., 47 Iowa 27.

It is further claimed that the corporation defendant, by its signature to the bond and letter, induced the plaintiff to become liable on the bond and letter also, and induced plaintiff also to pay the amount of the bond. It is stated however in the petition, that the defendant refused to pay its half, and it must be borne in mind, in view of what has preceded, that the brewing company and plaintiff were all the while, at and after the time of signing the bond, charged with notice that the officers of the defendant were not authorized to bind the defendant, and that attempts to do so on their part were illegal and void; and in this respect defendant's stockholders are innocent parties, while the plaintiff is not.

We are therefore of the opinion that the Circuit Court erred in sustaining the demurrer to the answer of the transfer company, and its ruling is reversed and the cause remanded.

Judgment reversed.

BEST BREWING CO. v. KLASSEN.

185 Ill. 37; 57 N. E. Rep. 20.

Appeal from appellate court, First district.

Action by Kunigunda Klassen against the Best Brewing Company of Chicago, of debt, upon an appeal bond. A judgment for plaintiff was affirmed by the appellate court (85 Ill. App. 464), and defendant appeals. Reversed.

Wilkin, J. This is an action of debt upon an appeal bond. In a forcible entry and detainer proceeding before a police magistrate in the city of Chicago, appellee, as plaintiff, recovered a judgment against Ruel G. Rounds for restitution of certain property. Rounds appealed to the county court of Cook county, filing an appeal bond as required by the statute. This bond was for $2,000, conditioned as provided by statute in such cases, and was signed by Rounds and appellant, as his surety; the latter's execution of it being as follows: "The Best Brewing Company of Chicago (Seal), by Charles Hasterlik, Its President (Seal)." In the county court judgment was again rendered for the plaintiff. Upon the failure of Rounds or the brewing company to comply with the terms of that judgment, this proceeding was commenced in the circuit court of Cook county to recover on the appeal bond. In defense to the action, the brewing company, by its pleadings, denied that the bond was its deed; alleged that the making of the same, as to it, was unauthorized, and that such act was not within the power of the corporation. Issues were joined, and a trial had by jury. At the close of plaintiff's evidence, a motion was made to instruct the jury to find for the brewing company, but these motions were overruled. The court then took the case from the jury, by instructing it to render a verdict for the plaintiff, Klassen, for $1,321.50. This being done, judgment for that sum was duly entered, and appellant appealed to the appellate court for the First district, where the judgment below was affirmed, and it now brings the case here upon further appeal.

The chief error insisted upon by appellant is that the circuit court held the bond sued on to be its act and deed,—the contention being that the powers of the company, as a corporation, are limited by its charter to those which are express or implied; that its express powers are to "manufacture and sell beer, ale,

and porter, and carry on a general brewing business, in all its branches''; that the implied powers it possesses are only those which may be implied as necessary to carry into effect one or more of those expressed; and that the signing of this appeal bond comes under neither of these heads, but was an act *ultra vires*, and therefore not binding upon the corporation. Appellee insists—First, that the act was within the corporate power of appellant; or, second, although in excess of its corporate power, yet, having made the bond and enjoyed certain benefits arising therefrom, it is now estopped to make the defense of *ultra vires*.

The general rule is that a corporation can do only those acts which are within the scope of its charter, and, if the signing of the bond in question as surety was an act not originally within the express or necessarily implied powers of the corporation, it is void, and no subsequent act could make it valid, by way of estoppel. It was so held in National Home Building & Loan Ass'n v. Home Sav. Bank, 181 Ill. 35, 54 N. E. 619, where the decisions of this court are reviewed; and we there said (page 44, 181 Ill., and page 621, 54 N. E.): ''If there is no power to make the contract, there can be no power to ratify it; and it would seem clear that the opposite party could not take away the incapacity, and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract by way of estoppel through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power.'' In that case it is also said: ''The cases in this court where the corporation has been held to be estopped have been where the act complained of was within the general scope of the corporate powers.'' In the case of Brewing Co. v. Flannery, 137 Ill. 309, 27 N. E. 286, relied upon by appellee, the defense of *ultra vires* was invoked, and it was held that the corporation was estopped to make that defense, inasmuch as it had enjoyed the benefit of the act; but there the act in question (which was the leasing of a building in which to conduct a saloon) was within the express power of the corporation.

We think the primary question here is not whether appellant has reaped a benefit from the act of becoming surety for Rounds upon the bond, but whether the act of signing it was within the

scope of its corporate authority. The purpose of the corporation, as expressed in its charter, is to manufacture and sell ale, beer, and porter, and carry on a general brewing business. It would seem no acts could be more unlike than the doing of those authorized by the charter of the company, and the signing of appeal bonds as surety. The instrument was executed in a suit, not by or against the corporation, but by a third person against another to recover possession of a house. *Prima facie,* the signing by the company of an appeal bond in such a suit was an act beyond the purpose for which it was organized, and consequently illegal. If it had been shown that it was executed clearly for the purpose of promoting or protecting its own business of brewing or selling beer, etc.,—that is to say, if the act had been reasonably necessary to accomplish the end for which the corporation was formed,—it would have been within the scope of the corporate power. But it cannot be held that every act in furtherance of the interests of a corporation is *intra vires.* Many acts can be suggested, which, though beneficial to the business of a corporation, are too remote from its general purposes to be deemed reasonably within its implied powers. What is and what is not too remote must be determined according to the facts of each case. The rule has been stated to be: In exercising powers conferred by its charter, a corporation "may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business." Clark v. Farrington, 11 Wis. 306. In the case of Lucas v. Transfer Co., 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 454, where a corporation chartered for the purpose of doing a "general freight and transfer business, and such other business as may not be inconsistent therewith," was sued upon a bond executed by it as surety with another corporation, the supreme court of that state said: "The plaintiff seeks to recover contribution from the corporation as co-surety on the bond of the brewing company, and claims (1) that the contract of suretyship was within the defendant's corporate powers; and (2) that, if it were not within the defendant's corporate powers, it has so acted on the contract as to now estop it from pleading *ultra vires.* * * * Whatever meaning may be attached to the language of the articles, it is quite certain it cannot include the contract of suretyship in question. The simple act of going security for another is out

of the line of the prosecution of any business. It is a mere accommodation, and it cannot be assumed that the articles gave the officers of defendant any power to jeopardize its capital in any such venture." Quoting from other authorities, it is there further said: "It is no part of the ordinary business of commercial corporations, and, *a fortiori*, still less so of noncommercial corporations, to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are *ultra vires*, whether in the indirect form of going on accommodation bills, or otherwise becoming liable for the debts of others. Green's Brice, *Ultra Vires*, 252; Madison, W. & M. Plank Road Co. v. Watertown & P. Plank-Road Co., 7 Wis. 59." These authorities are clearly in point here, and lead to the conclusion that the act of appellant in signing this bond, instead of being the exercise of a delegated authority, was an attempt to execute powers not conferred upon it, either expressly or by implication.

In reaching this conclusion we have not overlooked the contention of appellee that the execution of the bond by appellant was in furtherance of its business, and that this fact has been found adversely to appellant by the appellate court, and is therefore open to review here. This position is based upon the assumption that Rounds was, at the time of the suit against him for possession of the premises, engaged in selling beer in the house, and that appellant was furnishing him the beer; that the bond was executed on the part of the brewing company in order to enable him to retain possession of the property and continue his business therein, and to make further purchases from the company. If all this were true, the benefits to accrue to the corporation would certainly be of the most precarious and remote character. But we have searched the record in vain for evidence tending to support the assumption. The testimony wholly fails to prove, nor does it fairly tend to prove, that Rounds was engaged in any occupation calculated to promote the business of appellant, or that the business of the corporation was promoted or benefited in any degree by reason of the execution of the bond. Treating these as questions of fact material to the decision of the case, they are open to review in this court as a question of law, under the assignment of errors questioning the ruling of the trial court in refusing the motion of defendant for

a peremptory instruction to find for it, made at the close of all the evidence. Plaintiff below wholly failed to make out a cause of action against this appellant, and the circuit court improperly refused to instruct the jury to return a verdict in its favor. The judgment of the appellate court will accordingly be reversed.

Judgment reversed.

End

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c. *Infant liable as surety if he ratifies contract after becoming of age.*

OWEN v. LONG. 1873.

112 Mass. 403.

Contract upon a negotiable promissory note for $190, dated August 21, 1872, and signed by the defendant Gammon, as principal, and by the other defendants as sureties. The writ was dated February 20, 1873.

At the trial in the Superior Court, before Allen, J., Long relied upon the defence, that, at the time he signed the note, he was a minor, and contended that he became twenty-one years of age February 11, 1873. The plaintiff testified, against Long's objection, that, two or three days before the commencement of the action, he had a conversation with Long which tended to show that he, Long, at that time promised to pay the note.

The defendant Long was a witness, and upon cross-examination testified that, at the time he signed the note, he expected that Gammon would, if he got the money, pay him for services for which he was then owing him; that on the same or the next day Gammon did pay him $40, which he supposed was a part of the money lent by the plaintiff to Gammon, although he did not know that it was.

The defendant Long requested the court to instruct the jury that a minor cannot make a contract binding himself as a surety for another; that if he was a minor at the time he signed this note, the note as against him was void, and the action could not be maintained; and that the note could not be made valid by any promise to pay it made after his coming of age. The court declined so to instruct the jury, but instructed them that if Long was a minor at the time he signed the note, it would be a good defence, unless, after he became of age, he made a direct promise

to pay it; that if, after arriving at full age, and knowing that he had the defence of minority to the note, he promised to pay it, he was liable, although he was a minor when he signed it.

The jury returned a verdict against all the defendants, and the defendant Long excepted.

GRAY, C. J. It cannot be held as matter of law that to sign a promissory note as surety is necessarily not beneficial to an infant. It may or may not be beneficial to him, according to the actual circumstances of the transaction; and, at the trial of this case, there was some evidence that the defendant at the time of signing the note in suit expected to receive, and did afterwards actually receive, some benefit from so doing. As his contract might be beneficial to him, it was not absolutely void, but only voidable, and would be made binding on him by a direct promise to pay the note, after coming of age, and knowing that he had a defence to it by reason of his infancy. Whitney v. Dutch, 14 Mass. 457; Reed v. Batchelder, 1 Met. 559; Peirce v. Tobey, 5 Met. 168; Bradford v. French, 110 Mass. 365; Harris v. Wall, 1 Exch. 122; Curtin v. Patton, 11 S. & R. 305; Hinely v. Margaritz, 3 Penn. State 428.

Exceptions overruled.

HARNER v. DIPPLE. 1876.

31 Ohio State 72; 27 Am. Rep. 496.

Motion for leave to file a petition in error to the District Court of Clarke county.

The original action was brought by Dipple against Harner on an undertaking for stay of execution, executed by the defendant during his minority. It appears that the defendant arrived at his majority before the period of stay expired, and that after the expiration of the stay he acknowledged his liability, and promised the plaintiff, to whom the undertaking was made, to pay the amount of the judgment stayed. Upon this state of facts judgment was rendered for the plaintiff in the court of common pleas; which judgment was afterward affirmed by the district court.

To reverse these judgments leave is now asked to file a petition in error.

McIlvaine, J. The question made is, was the undertaking sued on absolutely void, or only voidable. If void, it was not subject to ratification; if voidable merely, it may be enforced after ratification.

Having considered this question upon principle, as well as upon authority, we are constrained to hold that the undertaking was voidable only, and that after ratification it became a valid and binding engagement.

In disposing of this case, we make no note of those principles which control cases where an infant, by reason of immaturity and natural incapacity, is, in fact, unable to assent to the terms of an alleged contract. When this undertaking was executed it contained every element of a valid contract, save only, that the party was under twenty-one years of age.

Except for necessaries, the law grants to infants immunity from liability on their contracts. This immunity is intended for their protection against imposition and imprudence, and is continued after majority as a mere personal privilege. This privilege of immunity, after majority, is not given because of the actual or supposed incapacity of an infant to enter into contracts intelligently and prudently. If actual incapacity existed, the privilege of infancy would not be needed for the purpose of defense. And it is contrary to our knowledge of human nature, that all infants are incapable of intelligently and prudently entering into engagements and assuming burdens. It is a matter of favor intended as a shield and compensation for the want of that greater wisdom and prudence which time and experience usually teach.

But, whatever may have been the natural capacity of the infant, whenever he arrives at majority, a time fixed by an arbitrary rule which, in the nature of things, can not affect the personal capabilities of its subject, the law presumes that he has acquired all the wisdom and prudence necessary for the proper management of his affairs; hence, the law imposes upon him full responsibility for all his acts and contracts.

In this new relation, it becomes his moral duty, and for its discharge he is invested with legal capacity, to affirm and perform, or to disavow, at his election, all his previous contracts of imperfect obligation. Contracts for necessaries are of perfect obligation, and, therefore, he can not disaffirm them. Contracts

founded on illegal considerations are of no obligation, and, therefore, may not be affirmed.

The appointment of an agent or attorney to make contracts is, perhaps, inconsistent and repugnant to the privilege of infancy, for the reason, among others that might be named, that it is imparting a power which the principal does not possess; that of performing valid acts. But, outside of these exceptions, which are based on special grounds, we see no reason why the power should be denied, to ratify any contract which, as an adult, he might originally make. The power of disaffirmance being coextensive, it is all that is needed for his protection.

If, in the case before us, the ratification had been made by payment, instead of a promise to pay, its binding effect would not be doubted. Why, therefore, should not the promise to pay be binding also? There is no question about consideration. The consideration which supported the original promise is sufficient to support the ratifying promise. The only contention here is, that the original promise was void by reason of infancy, not for want of consideration. If, therefore, actual performance by payment would have been binding, so should the promise to perform; and this, too, without regard to the fact whether or not the infantile contract was beneficial or prejudicial. The principles of jurisprudence are not violated by the performance of a contract prejudicial to the party. Indeed, a person, *sui juris,* is as strongly obligated by his contracts prejudicial as by those beneficial to himself; and the same principle should apply where a person, *sui juris,* ratifies and confirms his contract of infancy.

The plaintiff in error, however, relies chiefly on the authority of decided cases, and claims the settled law to be that all contracts of an infant prejudicial to him are absolutely void, and that a contract of suretyship is of that class.

In Swan's late treatise, among contracts of infants which have been decided to be void, is mentioned that of suretyship, but the author, in speaking of the state of the authorities, pithily and truthfully remarks, "What contracts of an infant are void, and what are merely voidable, nobody knows."

Keanes v. Bagcott, 2 H. Black. 511, decided in 1795, appears to be a leading case. The contract of an infant was held in that case to be voidable only, but in the opinion of C. J. EYRE a rule was stated, wherein certain of such contracts are said to be void. The rule was thus stated: "When the court can pro-

nounce the contract to be for the benefit of the infant, as for necessaries, it is good; when to his prejudice, it is void; and where the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant." This rule, modified so as to declare that a contract necessarily prejudicial to the infant is void, has been adopted in many later cases, both in England and in this country. But the current of more recent decisions repudiates the distinction between void and voidable contracts, on account of their beneficial or prejudicial nature, and holds them all to be voidable merely; and the more recent decisions of courts still adhering to the distinction, hold some contracts voidable only, which were before held to be void. Thus, in Owen v. Long, 112 Mass. 403, a surety contract was held to be voidable only, for the reason that such contract, as matter of law, can not be said to be necessarily prejudicial to the surety. Also an account stated is held to be voidable only. Williams v. Moor, 11 M. & W. 255. Also a conveyance by lease and release. Touch v. Parsons, 3 Barrows, 1794.

The following cases are to the effect that an infant's contract of suretyship is merely voidable, and may be ratified. They also show, with more or less force and directness, that the distinction between void and voidable contracts of infants, on the ground of benefit or prejudice, is not sound. Curtin v. Patton, 11 Serg. & R. 305; Hinely v. Marganitz, 3 Barr, 428; Gatchin v. Cromach, 13 Ver. 330; Vaughn v. Darr, 20 Ark. 600; Shropshire v. Burns, 46 Ala. 108; Williams v. Moore, 11 M. & W. 256; Fetrow v. Wiseman, 40 Ind. 148; Fonda v. Van Horne, 15 Wend. 631; Scott v. Buchanan, 2 Humph. 468; Cole v. Pennoyer, 14 Ill. 158; Cummings v. Powell, 8 Texas, 80; 1 J. J. Marshall, 236; Mustard v. Wohlford's Heirs, 15 Grattan, 329.

In Massachusetts, where the doctrine was approved that the acts of an infant are void, which not only apparently but necessarily operate to his prejudice (Oliver v. Clop, 13 Mass. 237), it was afterward said by Chief Justice PARKER, in Whitney v. Dutch, 14 Mass. 457: "Perhaps it may be assumed as a principle that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal substratum for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them, when he has legal capacity to make a contract, they are, in all respects,

like contracts made by adults." And in 1840 (Reed v. Batchelder, 1 Met. 559), Chief Justice Shaw said: "The question, what acts of an infant are voidable and what void, is not very definitely settled by the authorities; but, in general, it may be said that the tendency of modern decisions is to consider them as voidable, and thus leave the infant to affirm or disaffirm them when he comes of age, as his own views of his interest may lead him to elect."

So that, Mr. Parsons, in his work on contracts, Vol. L., p. 294, 6th ed., says: "The better opinion, however, as may be gathered from the latter cases, cited in our notes, seems to be that an infant's contracts are, none of them, or nearly none, absolutely void; that is, so far void that he can not ratify them after he arrives at the age of legal majority."

In 1 American Leading Cases, 5th ed., p. 300, it is said: "The numerous decisions which have been had in this country justify the settlement of the following definite rule as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessaries. The only act which he is under a legal disability to perform is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable by him at his election," on arriving at majority. This rule has been quoted and approved in 14 Ill. 158, and 15 Grat. 329, and we think it embodies the better reason.

In the light of principle, therefore, as well as by the weight of the later authorities, the whole question should be thus resolved: The privilege of infancy is accorded for the protection of the infant from injury, resulting from imposition by others or his own indiscretion. That object is fully accomplished by conferring on him the power to avoid his contracts, or, in other words, by giving him immunity from liability until such contracts are ratified by himself after arriving at full age. And, again, that an adult, laboring under no disability, may perform his unexecuted contracts of infancy, whether they be beneficial or prejudicial to him, and that he will be bound by such performance, we think, is a proposition too plain to be doubted. If, therefore, with full knowledge of the facts, he ratifies and affirms them, being moved thereto by his own sense of right and duty, he should, in law, as in morals, be bound to their performance.

Motion overruled.

CHAPTER IV.

EXECUTION OF CONTRACT

a. The principal, in procuring the signatures of sureties to his obligation, acts as the agent of those who have already signed, and not as the agent of the obligee.

CARTER v. MOULTON. 1893.

51 Kan. 9; 32 Pac. Rep. 633; 37 Am. St. Rep. 259.

Error from district court, Marion county; Frank Doster, Judge.

Action by A. L. Moulton against Martha A. Carter on a promissory note. Plaintiff's demurrer to the answer was sustained, and defendant brings error. Affirmed.

ALLEN, J. This action was brought by A. L. Moulton on a promissory note, which reads as follows: "$600.00. Marion, Kansas, December 7, 1887. Nine months after date, we promise to pay to the order of A. L. Moulton, at the Cottonwood Valley Bank, Marion, Kansas, six hundred dollars, with interest at 12 per cent per annum until paid. Value received. J. M. Wishart, R. E. Knapp, R. C. Cable, C. E. Foote, M. A. Carter." The defendant, M. A. Carter, filed her separate answer, which reads as follows, (omitting title:) "Now comes the defendant, M. A. Carter, and for her separate answer herein says that the consideration of the note sued on by the plaintiff herein was for money borrowed by J. M. Wishart of and from the plaintiff, no part of which was ever had or received by this defendant; that this defendant signed said note as surety, only, for said Wishart, all of which was at the time well known and understood by the plaintiff; that this defendant signed her name to said note only as an escrow, on the express condition that said Wishart, the principal in said note, would hold the same as such escrow, and not deliver it to the plaintiff until he, the said Wishart, should execute in favor of said plaintiff, to secure the payment of said note and interest, a mortgage on his homestead in the city of Marion, county of Marion, state of Kansas, and upon that condition only did this defendant sign her name to said note, and not otherwise; and that defendant never delivered said note to plaintiff, nor authorized the same to be delivered, and, if delivered by said Wishart, it was done without the authority or

consent of defendant; that said Wishart failed, neglected, and refused to execute said mortgage on his homestead, in favor of said plaintiff, to secure the payment of said note and interest, as aforesaid. Wherefore, said note is not the act and deed of this defendant. Defendant, having fully answered, asks to be discharged with her costs." To this answer the plaintiff demurred, and the district court sustained the demurrer, and the plaintiff in error brings the case here to review that decision.

Counsel for the plaintiff in error contends that the note sued on was signed by the plaintiff in error as surety, only, upon an expressed condition which was never performed, and that the plaintiff in error was therefore not liable; that the note is void because it was never delivered to the defendant in error by the plaintiff in error, or by her authority. It is conceded by the demurrer that the plaintiff knew the fact that M. A. Carter signed the note as surety, but it is nowhere averred that the plaintiff knew of the agreement between M. A. Carter and the principal in said note, with reference to the giving of a mortgage. The plaintiff in error contends that the delivery of the note by the surety to the principal after its execution by the surety, under an agreement of the kind stated in the answer, made the instrument an escrow, and that no validity could be given to it by a delivery in violation of the terms agreed on between the parties.

It is true that the holder of an instrument placed in escrow can give it no validity, generally speaking, by a delivery in violation of the agreement. In order to make the instrument an escrow, however, such delivery must be to a third person, not a party to the instrument. See Bouv. Law Dic. and cases therein cited; State v. Potter, 63 Mo. 212. The note in this case was perfect in form at the time it was delivered to the payee. It is not claimed that the principal made any change in the form of the note, nor in the signatures thereto, after it was signed by the plaintiff in error. It is the fact that it was delivered in violation of a secret understanding between the principal and the surety, which plaintiff in error claims renders the note void in the hands of the payee, who, for anything that appears in the note, paid full value for it. Many authorities are cited by counsel to sustain the proposition that the note is void as to the surety, but none of them go so far as to sustain the plaintiff's position in an action brought on a negotiable promissory note.

In the case of People v. Bostwick, 32 N. Y. 445, it is held that a bond delivered under similar circumstances is void as to the surety; and in the case of Pawling v. U. S., 4 Cranch, 219, the same doctrine is held. The New York case comments on the difference in the rule with reference to the delivery of a deed and a delivery of a sealed instrument securing the payment of money, and also on the difference between a bond and a negotiable bill of exchange or promissory note. In the case of Bank v. Luckow, 37 Minn. 542, 35 N. W. Rep. 434, the delivery was to the agent of the payee; and in the case of Perry v. Patterson, 5 Humph, 133, the delivery was to the attorney of the payee. None of the cases cited by counsel for plaintiff in error are directly in point. The doctrine contended for, even as applied to bonds, is expressly denied, we think, by the weight of authority. See Dait v. U. S., 16 Wall. 1; State v. Potter, 63 Mo. 212; State v. Peck, 53 Me. 284. The precise point presented in this case is very fully considered by the supreme court of Indiana in the case of Deardorff v. Foresman, 24 Ind. 481, where it is held: "If a surety signs and delivers to his principal an instrument perfect upon its face, with a condition that it is not to be delivered to the obligee, payee, or grantee until some persons, who are agreed on, shall also execute the same, and the principal delivers the instrument without regard to the condition, and the obligee, payee or grantee has no knowledge of the condition, the delivery will bind the surety." To the same effect, also, are the cases of Gage v. Sharp, 24 Iowa 15; Bonner v. Nelson, 57 Ga. 433; Fowler v. Allen (S. C.), 10 S. E. Rep. 947. Where a negotiable promissory note, perfect in form, executed, as in this case, by a number of persons, is intrusted to one of the makers by all, we think there is a presumption that the party so holding the note has authority to deliver it to the payee. When a note so executed is presented by the principal to the payee without any notice to the payee of any understanding between the makers, affecting the right of the principal to deliver to the payee, we think he is justified in assuming that the parties who so signed the note intended to be bound thereby, and that he may receive the note, and deliver to the principal the consideration therefor, without first making inquiries of the other parties to the instrument for the purpose of learning whether there are any secret agreements of under-

standings affecting the instrument. We see no error in the ruling of the court below, and the judgment will be affirmed.

All the justices concurring.

TRUSTEES OF SCHOOLS v. SCHEICK. 1886.

119 Ill. 579; 8 N. E. Rep. 189; 59 Am. Rep. 830.

Appeal from appellate court, Second district.

CRAIG, J. This was an action of debt brought by the board of school trustees against the appellees upon the bond of Phillip Reitz, a defaulting school treasurer. In the circuit court the plaintiffs recovered a judgment,, but on appeal the appellate court reversed the judgment, and decided that no action could be maintained on the bond against the trustees, and under this ruling no remanding order was entered. The bond was never executed by Phillip Reitz, the principal, although his name was inserted in the condition and obligatory part of the instrument. It was properly executed by appellees as sureties, and was accepted and approved by the board of school trustees.

Much reliance seems to be placed, in the argument, upon the finding of facts as incorporated in the judgment of the appellate court; it being claimed that the court found that appellees signed the bond upon the condition that it should not be delivered until it had been executed by the principal. We do not so understand the finding. The circuit court has found the facts, and recited in the record what that finding was, and this seems to have been adopted and sanctioned by the appellate court. Upon an examination of the finding of the circuit court it will be seen that the court found from the evidence that Reitz promised the sureties that he would sign the bond before it was delivered. This, however, does not constitute the execution of a bond upon condition that it should not be delivered unless executed by the principal. Indeed, the sureties seemed to rely upon the promise of Reitz, and not upon a conditional delivery, as is apparent from the finding of facts by the circuit court, and from the decided weight of evidence.

It is also said that the liability of appellees should be construed strictly. The general rule is that the undertaking of a

surety is to be construed strictly. He is only bound in the manner and to the extent set forth in the obligation executed by him. Cooper v. People, 85 Ill. 417. But, adhering to this rule to its ultimate limit, are the sureties liable on the obligation which they executed? The statute required this bond to be executed and delivered to the trustees, for the purpose of keeping secure the public funds, and for the purpose of guarding against a public loss. In view of this fact, while we regard it proper to adhere to the rule of law indicated above, still a surety who has incurred an obligation of this character should not be allowed to escape liability upon a mere technical defect in the obligation he may have executed, which does not go to the substance of his undertaking. Keeping this principle in view, we will examine the principal objections urged against the validity of the bond upon which the action is predicated.

It is claimed that where the name of an intended co-obligor appears upon the face of a bond, who has not executed it, the instrument is imperfect and not binding. The decisions of the courts of the different states are not harmonious in regard to the binding effect of a bond upon the rights of sureties, where the bond has not been executed by the principal. In Bean v. Parker, 17 Mass. 603, where an action was brought against the sureties on a bail-bond which had not been executed by the principal, the court held that no action could be maintained. It is there said: "We think it essential to a bail-bond that the party arrested should be a principal; it is recited that he is; and the instrument is incomplete and void without his signature." In a later case (Russell v. Annable, 109 Mass. 72), where the principals on a bond constituted a firm, and the firm name was signed by one of the partners, the court held that the surety was not bound, unless it appeared that the partner who signed the firm name had authority from his partner to do so. In Wood v. Washburn, 2 Pick. 24, an administrator's bond not executed by the administrator was held not to be binding on the surety. In Ferry v. Burchard, 21 Conn. 602, a similar question arose, and the court held that a contract of a surety was of such a nature that there could be no obligation on his part unless the principal was also bound. In Bunn v. Jestmore, 70 Mo. 228, a late case, and one, too, quite similar to the one before us, the sureties on a constable's bond were held not liable for a

default of the constable upon the sole ground that the bond had not been executed by the principal. There are other cases holding a like view, and there are others which hold that the sureties may be held liable although the principal did not execute the instrument. State v. Bowman, 10 Ohio 445, was an action on a treasurer's bond. The principal's name was in the body of the bond, but he did not sign the instrument. The sureties defended on the ground that the principal had not signed it, but the court held that they were bound. Lowe v. Stocker, 68 Pa. St. 226, was an action against sureties on a bond of indemnity. The principal's name had been signed without authority. On the decision of the case it was said: "Had the bond not been executed at all by the principal, though his name was mentioned as one of the obligors in the body of the instrument, it is clear that the surety could not avail himself of this fact as a defense." Herrick v. Johnson, 11 Metc. 34; Keyser v. Keen, 17 Pa. St. 330; Haskings v. Lombard, 16 Me. 142; Grim v. School Com'rs, 51 Pa. St. 219; Williams v. Marshall, 42 Barb. 524; Miller v. Tunis, 10 U. C. 423, announce a similar rule. The supreme court of Michigan does not seem inclined to adopt the rule established in either class of cases cited above, but seems disposed to adopt a medium ground. Johnston v. Township of Kimball, 39 Mich. 187, is a case in its facts quite similar to the one under consideration. There, as here, the suit was against the sureties on the official bond of a defaulting treasurer. The bond was drawn, setting out the name of the principal and sureties, but it was never executed by the principal. In the decision of the case the court said: "Our statutes plainly contemplate that the treasurer shall himself be a party to his own official bond; and, while we are not prepared to hold that a bond knowingly and intentionally given without his concurrent liability will not bind the obligors, we are of the opinion that where he purports to be obligor, and does not sign the bond, there must be positive evidence that the sureties intended to be bound without requiring his signature, before they can be held responsible." See, also, Hall v. Parker, 39 Mich. 287, where the same doctrine is announced.

We have given the authorities bearing on the question due consideration, and we are not inclined to adopt the view held by the courts, that a bond signed by the sureties without the

signature of the principal may not be binding upon those who execute it, as was held in the case cited from Missouri and other like cases. If the sureties saw proper to bind themselves without the principal executing the bond and becoming bound, we think they might do so, and their undertaking is one that may be enforced in the courts by an appropriate action. The fact that the principal obligor in this case failed to sign the bond was a mere technicality, which ought not to affect the rights of any of the parties concerned. In what way are the sureties injured by the omission of the principal obligor to sign the bond? If they are compelled to pay the trustees any sum of money on account of the default of the treasurer, they can recover the amount back from him whether he signed the bond or not. So far, then, as they are concerned, they are in as good a position as if Reitz, the treasurer, had properly executed the bond. If Reitz is insolvent, a judgment in favor of the trustees against him could be of no benefit to the sureties. If, on the other hand, he is solvent, the sureties can collect from him whatever sum they may be required to pay in consequence of executing the bond. If the bond had been signed by the sureties upon condition that it should not be delivered to the trustees until executed by the treasurer, and if the trustees had received notice of such condition, or notice of such facts pointing to such a condition, as might put a prudent person on inquiry before the bond was approved, then they could not be regarded as innocent holders of the instrument, and entitled to maintain an action upon it. But the sureties, as appears, did not sign the bond on such a condition, but executed the instrument, and relied merely upon the promise of the treasurer that he would, before delivery of the bond, sign it. This was no more than a secret promise made by Reitz, the treasurer, to those who signed as sureties, which could not be binding upon the trustees. They had no notice of the arrangement existing between the treasurer and the sureties, and they ought not to be affected by it.

In Smith v. Peoria Co., 59 Ill. 414, where an action was brought upon an official bond against one of the sureties, he set up as a defense that he signed the bond on condition that it should also be executed by one Cox as co-surety before it should be delivered; that Cox failed to execute the bond; that, in violation of the agreement, the bond was delivered without his

knowledge or consent. On demurrer to pleas in which this defense was set up the matters alleged were held not to constitute a valid defense to the action on the bond; but other pleas, in which the same facts were set up, and also that the plaintiff had notice, were held to constitute a valid defense to the action. Under the ruling in the case cited, if the bond in this case was signed by appellees upon condition that it was not to be delivered until executed by the principal, and the trustees, at the time they accepted and approved the bond, had notice, no action could be maintained on the bond; but, as said before, no such defense was made out.

The judgment of the appellate court will be reversed, and the judgment of the circuit court will be affirmed; the cause remanded to the circuit court for further proceedings in conformity to this opinion.

SCHOFIELD, J., dissenting.

HELMS v. WAYNE AGRICULTURAL COMPANY. 1881.

73 Ind. 325; 38 Am. Rep. 147.

Action on promissory notes. The opinion states the case. The plaintiff had judgment below.

WOODS, J. Suit by the appellee, against the appellants and Isaac N. Poe, begun in Hamilton county and taken by change of venue to Madison county. The appellants denied the execution of the note, and filed other special pleas, the nature of which will become apparent as we proceed. Error is assigned only upon the overruling of the motion for a new trial, and the counsel for the appellants insists only upon errors claimed to "Arise out of the instructions given and refused."

The following are the instructions complained of:

"1st. This action is brought by the plaintiff on two joint promissory notes, claimed to have been issued jointly by all the defendants to the plaintiff. The defendant Poe makes no defense. The defendant Helms claims that he never executed the notes in suit, that is, he never signed them himself, nor authorized any one to sign them for him, and that he never affirmed

or ratified the signature after it was so placed to said notes, in any manner whatever. The other defendant, Cardwell, claims that his co-defendant Helms' name or signature was feloniously placed to said notes, by some person not known to them, that is, the name of said Helms was forged to said notes, and that as the notes were therefore void as to Helms, he, Cardwell, was also released by said forgery, and the plaintiff ought not to recover against him, as the name of Helms was on when he signed. The said defendants also filed a joint answer, setting up that the plaintiff procured both of said defendants to execute the notes through fraud; that the notes were presented in blank, and so signed, with the agreement that they be filled up for certain sums, when the plaintiff, after the signatures were obtained, filled the blanks with different and greater sums than were agreed upon, and put a false date to said notes, making them mature sooner than by the agreement they were to fall due. Now, if these or any one of the material facts in this joint answer be proven true, by a preponderance of the evidence, you should find for the said defendants; otherwise you should find for the plaintiff, unless you further find that Helms' name to the notes was forged, and that he never executed said notes, then he is not bound, and you should find for him, and for the plaintiff as against the other defendants, if she has proven, by a preponderance of all the testimony, that the notes were executed by the other defendants as alleged in her complaint.

"2d. The notes in suit being joint-notes executed by several parties, one of the names thereon being forged, they would be void as to the person whose name was forged, but valid as to the other makers, unless at the time she accepted said notes the plaintiff had knowledge of the forgery, or in some way participated in the fraud of wrongfully obtaining the said signature; but if you find that the plaintiff received and accepted said notes in good faith and without any knowledge or information that any of the signatures were not genuine or false, being innocent of any wrong, the law protects, and you should find for the plaintiff against those who did sign the notes.

"3d. Where several persons execute a joint-note, and it is delivered to and received by the payee in good faith, the parties who signed are not discharged because the name of one is forged to such note, and it makes no difference whether the forged

name stands first or last on such note, for the law implies an assertion on the part of each who signs, that all the names preceding his are genuine, for it is not to be presumed that a man would affix his name to a note when the prior names were forged; and if one of two innocent persons has to lose by the wrong of a third, the law places the loss on the party who had the opportunity to avoid the wrong and did not do it, as every one ought to know when he signs a note with other signatures thereon, that all are genuine, and failing to do so, is guilty of neglect, and must bear the consequences; and if you find from the evidence in this case, that such were the facts as to said defendant Cardwell, he is liable, and you should find against him on said issue.

"4th. Where sureties sign a note, with an agreement that other persons shall sign the same before it is delivered, and the note is delivered without being signed by such other persons, it will still be binding on such as sign it, unless the payee of the note is a party to the agreement. Hence if you should find that the notes in suit were signed by the defendants Helms and Cardwell, under an agreement with the principal that other persons should sign the said note before it should be delivered, and that it was delivered without such other signatures to the principal in the notes, and the plaintiff knew nothing of such agreement, and was no party thereto, then it could not bind the plaintiff, and your verdict should be for the plaintiff."

The appellants also excepted to the refusal of the court to give the following instructions:

"5th. If you believe from the evidence that Isaac N. Poe signed the defendant Helms' name to the notes sued on, without the consent of Helms, then you should find for both the defendants, unless the defendant Cardwell signed the notes knowing that Helms' name was forged.

"7th. And if these notes were signed by Poe in the name of Helms, without the proper authority from Helms, then you should find for both Helms and Cardwell, if Cardwell signed in the honest belief that the signature of Helms was genuine.

"8th. And if the notes in suit were sent by the plaintiff, either filled up or not filled up, as to the amount of the same, to the defendant Poe with a request by the plaintiff for Poe to get security on them, then, for the purpose of obtaining such

security, the said Poe was the agent of the plaintiff, and the plaintiff can reap no benefit by the fraudulent act or forgery of said Poe."

Verdict and judgment against both appellants.

The court committed no error in reference to these instructions, either in giving or in refusing.

The doctrine of the instructions given is expressed in the following proposition, namely: When the name of one of two or more obligors in a bond, note, or other writing obligatory, has been forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee or obligee accepted the instrument without notice of the forgery. This doctrine is supported either directly or in principle by the following authorities: Veazie v. Willis, 6 Gray, 90; York County M. F. Ins. Co. v. Brooks, 51 Me. 596; Franklin Bank v. Stevens, 39 id. 532; Stoner v. Millikin, 85 Ill. 218; Selser v. Brock, 3 Ohio St. 302; Bigelow v. Comegys, 5 id. 256; Hagar v. Mounts, 3 Blackf. 57; Harter v. Moore, 5 id. 367; Carr v. Moore, 2 Ind. 602; State v. Van Pelt, 1 id. 304; Deardorff v. Foresman, 24 id. 481; State v. Pepper, 31 id. 76; Craig v. Hobbs, 44 id. 363; Brandt Suretyship, § 358.

The appellants insist on a contrary doctrine, relying mainly for authoritative support upon the case of Seeley v. People, 27 Ill. 173. That case goes fully to the extent claimed for it, but it was confessedly decided without citation or knowledge of any supporting authority, and has recently been expressly overruled by the case of Stoner v. Milliken, *supra*, which, besides a citation of adjudicated cases, is supported by reasons much more satisfactory and conclusive.

Counsel have referred us to the remarks of Judge REDFIELD, in 3 Am. L. Reg. (N. S.), p. 404, in a note to Insurance Company v. Brooks, *supra*, wherein he says: "We confess to a strong inclination, in questions affecting specialties and simple contracts not negotiable, to favor the English rule. It seems to us that too many of the American cases in striving to require good faith and diligence of the obligor or promisor, having quite too much overlooked the corresponding obligations on the part of the obligee. We can see no good reason why the obligee, who in accepting the bond, trusts to the representations of the

principal obligor as to the execution of the instrument by the others, who are known to stand as co-sureties, should be any more entitled to screen himself from the consequences of those representations proving false, than should the obligor. The true rule in such case seems to be that each party may stand upon the facts of the case, unless he has been guilty of fraudulent misconduct. This is certainly the present English rule upon the subject, and the one which we believe will ultimately prevail in this country."

The English cases cited can hardly be said to go so far. But suppose it be granted that each party may stand on the facts of the case, what meaning shall we attach to the phrase, and what consequences must follow? More can hardly be intended than that in the absence of fraudulent conduct or intent on his part, the surety who signs after a forged name shall be deemed to have been no more and no less careless than the obligee who accepts the paper with the forged name thereon, and neither shall be deemed to have owed any duty to the other to detect and expose the false signature. In other words, they stand, on the facts of the case, alike deceived and alike blameless or in fault. What are the consequences as to their rights under the contract? Shall the surety be discharged, and the obligee get nothing? It will not do to say that the consideration as to him, as well as the principal debtor, moved from the creditor, and is in no degree diminished. But if we confound consideration with motive or inducement, it still may not be said to have wholly failed because in the language of Judge Redfield in note to Seely v. People, 2 Am. L. Reg. (N. S.) 346, "he is supposed to have assumed the obligation, in part at least, upon the credit of the party for whom he became surety," and cannot have relied on his supposed co-obligor for more than a contributive share of the liability.

The plain solution of the question, in accordance with legal principles and natural justice, is that the parties will be left in the predicament into which they have voluntarily come, and neither being able to claim that he was misled or deceived by the other, their contract will be enforced as they made it. There is no equity in the case which can interrupt the course of the law.

(Omitting minor questions.)

We find no error in the record. The judgment of the Circuit Court is therefore affirmed, with costs.

Judgment affirmed.

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b. When name of supposed co-surety is a forgery surety is not released if creditor acts in good faith.

STONER v. MILLIKIN. 1877.

85 Ill. 218.

Mr. Chief Justice SHELDON delivered the opinion of the Court: At the February term, 1874, of the county court of Macon county, a judgment was entered by confession, in favor of Millikin & Co., against Thomas Lee, John Lee, and Andrew J. Stoner, for $453.33, upon a promissory note with a warrant of attorney attached, purporting to be executed by the three latter, dated the 24th day of June, 1873, payable ninety days after date to H. Crea and assigned by him without recourse.

An execution, issued upon the judgment, was levied upon personal property of John Lee, sufficient in value to satisfy it. Afterward, by direction of Millikin & Co., the sheriff released the property of John Lee from the levy, and levied the execution upon certain real estate of Stoner, and the bill in this case was filed by Stoner to enjoin the sale of his property under the execution.

The court below, upon final hearing on proof, dismissed the bill, and the complainant appealed.

The chief ground relied upon in support of the bill is, that the signature of the name of John Lee to the note is a forgery. The note is a joint and several one, the signature of Stoner being last upon the note. He testifies that Thomas Lee applied to him to sign the note as his security; that he refused to do so unless Lee would first get his brother, John Lee, to sign the note; that Lee went away saying he would go and get John to sign it; that the next day he came back, saying that he had got John to sign it, and presented the note with the signature of John Lee appearing to it, and witness then signed it, supposing the signature of John Lee to be genuine, knowing him to be re-

sponsible, and had he not supposed the note to have been signed by John Lee, he would not have executed it. Thomas Lee had made the arrangement beforehand with Millikin & Co., to lend him the money. H. Crea, the payee of the note, was but nominally such, Millikin & Co. being the real payees, and on presentment of the note, with Crea's indorsement on it by Thomas Lee to Millikin & Co. who were bankers, they discounted the note, paying the proceeds to Thomas Lee.

The bill alleges, the way John Lee's property came to be released was, that he made an affidavit that he never signed the note and that his signature to the same was a forgery, and that upon the making of such affidavit Millikin & Co. caused his property to be released from the levy. Although it is this forgery which is mainly relied on for the discharge of Stoner, it is yet objected, as against the release of John Lee's property and the levy on Stoner's, that there is no proof of the forgery, more than this affidavit. Upon an examination of the bill we take that, as alleging the fact of the forgery; and the answer of Millikin & Co. and the sheriff admits the same. By the pleadings, the forgery must be considered an admitted fact in the case. The confession of judgment, then, against John Lee, was unauthorized, and a nullity and his property was rightly released from the levy under the execution.

Why should this forgery operate in discharge of Stoner and entitle him to have his property exempted from sale on the execution?

It may have been a wrong toward him, and have caused him to incur a greater extent of liability than he expected; and the supposed obtaining of the execution of the note by John Lee may have been the sole condition upon which he signed his name to the note. Yet, on satisfactory evidence to himself, in that respect, he did place his name unconditionally to the note as a maker thereof, and left it with Thomas Lee to deliver to Millikin & Co. knowing that on the faith of his, Stoner's, promise to repay it, they would part with their money to Thomas Lee. There is no just reason why this promise to Millikin & Co. should not be kept.

Whatever of wrong there was to Stoner was perpetrated by his co-maker Thomas Lee. Millikin & Co. were wholly innocent in the matter; they had no notice of anything which had been

transpiring among the makers of the note, as between themselves. Nor was it incumbent upon Millikin & Co. to exercise care over the interest of the surety in the note, look to the inducement which led him to become such, and see that it should not fail. They had but to watch over their own interest, and see that the security offered was a sufficient protection for them. For the lack of the vigilance they failed to exercise in this respect, they suffer the full consequence in the loss of the security of the name of John Lee. Whatever of fraud and deception the co-makers of the note practiced toward one another was their own sole concern, and the consequence, so far as may affect them in their relation to each other, should be borne by themselves alone. There is no justice in requiring Millikin & Co. to assume the risk of such conduct, and no sound principle upon which they should be made to suffer loss because of it, not being privy thereto.

York County M. F. Insurance Co. v. Brooks, 51 Me. 506, and Selser v. Brock, 3 Ohio St. 302, are direct authorities to the point that such a forgery of the name of a prior surety will not discharge a subsequent surety. See Young *et al.* v. Ward, 21 Ill. 223.

We regard the language of Lord Holt, in Hern v. Nichols, 1 Salk. 289, as applicable, that "Seeing that somebody must be a loser by this deceit it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser, than a stranger."

The case of Seely v. The People, 27 Ill. 173, is departed from so far as it conflicts with the principle of the present decision.

We are satisfied with the decree, and it is affirmed.

Decree affirmed.

or co-surety or principal

c. Where ~~the principal~~ is a married woman, an infant or an insane person, the surety is nevertheless bound, if creditor acts in good faith.

GOSMAN v. CRUGER. 1877.

69 N. Y. 87; 25 Am. Rep. 141.

Appeal from judgment of the General Term of the Supreme Court in the second judicial department affirming so much of the judgment herein as dismissed the complaint, as to defendant Eliza L. C. Cruger. (Reported below, 7 Hun, 60).

This action was brought upon a bond executed by defendants as sureties for one Edward R. Olcott, since deceased, conditioned for the faithful performance of his duties as guardian of plaintiffs.

The complaint alleged that said defendant Eliza was, at the time of the execution of the bond, a married woman, having a separate estate, and it was asked that the amount of the recovery be adjudged a charge upon her separate estate.

Attached to the bond was an affidavit signed by the sureties, to the effect that they were each worth the sum of $10,000, over and above all debts and liabilities. The bond was presented and filed with the petition for the appointment of said guardian, and upon them he was duly appointed, and received, as such, in pursuance of an order of the court, moneys belonging to plaintiffs which he converted to his own use.

The court directed judgment against defendant, John P. Cruger, but directed a dismissal of the complaint as to defendant, Eliza. Judgment was entered accordingly.

FOLGER, J. A married woman is bound by her contracts made in her separate business, or relating to her separate estate, as provided in the married woman's acts of 1848, 1849, 1860 and 1862; and they may be enforced against her at law or in equity.

If her contracts are not thus made or do not thus relate, they are void at law, and may not be enforced in equity against her separate estate, unless the intention of charging that estate is expressed in the contract, or implied from its terms; (Yale v. Dederer, 22 N. Y. 450).

The bond sued upon in this action is not a contract made by Mrs. Cruger in her separate business nor does it relate to her separate estate, nor is there expressed in it an intention of charging that estate. It seems, therefore, that the plaintiffs cannot recover against her.

The appellants seek to go outside the bond, and to find the requisite expression of intention, in the other circumstances, acts and papers, in the proceeding. Authorities are cited to the effect that a bond given in pursuance of a decree is to be construed with the decree and that the terms of the latter enter into and form a part of the contract. But there is nothing to be found in the proceedings which led to the execution of this bond, which shows a purpose on the part of the court to compel Mrs. Cruger to bind her separate estate, even if there was the power to compel a married woman so to execute a bond. It does not appear, indeed, that it was known that she was a married woman. The reference made to the rules of the Supreme Court (rule 65), of chancery (rule 148), and to the statute which authorized those rules (2 R. S., 175, § 46), is no more than to say that the law required two sufficient sureties. If one of the sureties had been an infant he would not because of the rules and the statute, have been held to have made a valid contract. And though Mrs. Cruger might have made a valid contract had she put it in the requisite form, she is not to be held to have done so merely for the reason that the law was not complied with when she did otherwise. Nor does the fact that she made an affidavit that she possessed enough estate to make her a sufficient surety, incorporate into the contract of suretyship the expression of an intention to bind that estate if it was separate. That it was a statement in writing makes it no more efficient than if by parol (Maxon v. Scott, 55 N. Y. 247), so far as the expression of an intention is concerned. It might be demanded in writing, to meet the Statute of Frauds. But it was, though in writing, outside of the written contract as much as such a statement in parol *aliunde,* would be outside of a contract valid by parol. Parties may struggle against the rule, but it is the rule, that the intention to charge the separate estate must be expressed in the contract, or implied in the terms of it. The affidavit is no part of the contract or of its terms. It is but a statement in

legal form that the person named in the contract is of sufficient estate to be a proper party to it.

It is claimed that the reason of the rule declared in Yale v. Dederer, does not apply to this case, and that, therefore, the rule ceases. That reason is said to be this: That a contract made by a married woman is void at law; that it may be enforced in equity under some circumstances but not when it is a contract of suretyship, for there is no equity springing out of the consideration. It is then claimed, that suretyship for a guardian is an exception to this rule, as equity will enforce against persons, *sui juris,* who become sureties their obligations, the same as if they made them as principals. The authorities in this State cited by the appellants, do not sustain the proposition. What was substantially held in Wiser v. Blackly (1 J. Ch. R., 607), was that one signing a bond as surety was, as well as one signing as principal, liable to a suit to reform the contract so as to conform it to the intention of the parties, and as the defendant's answer admitted that the surety intended to bind himself for the guardian, a mistake in the form of the bond was corrected or treated as so. So it was in Prior v. Williams (2 Keyes, 530), which was not the case of guardianship.

The case from Jones' Reports (Sikes v. Truitt, 4 Jones Eq. (N. C.) 360), is professedly based on that from Iredell, and with some distrust of the correctness of the precedent. That from Iredell (Armistead v. Bozman, 1 Ired. Eq., 117) is to the same effect as Wiser v. Blackly (supra); that the instrument may be corrected in form to agree with the intention of the surety as admitted or proven.

It is then claimed that Mrs. Cruger, by not making known to the court that she was a married woman, was guilty of a fraud on it. It is claimed that, either as a mistake or as a fraud, the court will take hold of it, and enforce the bond against her. It need only be said as to this, that the intention to charge the separate estate is made an issue by the pleadings and found against the plaintiffs; and that fraud is not found nor alleged.

The judgment must be affirmed.

All concur. *Judgment affirmed.*

Promise of a married wom

WINN v. SANFORD. 1687.

148 Mass. 39; 14 N. E. Rep. 119; 1 L. R. A. 512; 1 Am. St. Rep. 461.

Contract upon the following bond, executed by Susan B. Winn, as principal, and the defendant, Frederick C. Sanford, as surety: "Know all men by these presents, that we, Susan B. Winn, wife of John Winn, of Nantucket, as principal, and Frederick C. Sanford, of Nantucket, as surety, are holden and stand firmly bound unto John Winn, of Nantucket, above named, in the sum of three hundred dollars, to the payment of which to the said John Winn, or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators. The condition of this obligation is such that, whereas, in a settlement of differences between said John Winn and Susan B. Winn, it was agreed by said Susan B. Winn, and on her behalf, that she should give to said John Winn a bond, with surety, 'to release dower whenever requested, and make no further claim on said John Winn for any support, or for any cause whatever.' Now, therefore, if said Susan B. Winn shall, whenever requested, sign release of dower in any real estate of said John Winn, and shall make no further claim upon him for any support, or for any cause whatever, then this obligation shall be void; otherwise it shall be and remain in full force and virtue." The court ruled, as a matter of law, that the bond could not be made the basis of any legal claim against the defendant; that Mrs. Winn not being liable to her husband under it, the defendant was not liable. The plaintiff alleged exceptions.

By Court, Devens, J. It is true, as a general proposition, that the liability of a guarantor or of a surety is limited by that of his principal. But to this there are certain exceptions. Thus, where the principal is excused from liability for reasons personal to himself, and which do not affect the debt he has incurred or the promise he has made, the surety would not be entitled to the benefit of this excuse. In such case, he is in a certain sense an independent promisor, and must perform his promise.

In Maggs v. Ames, 4 Bing. 470, the defendant had guaranteed the purchases made by a married woman incapable of making a contract; the question in the case was whether this guaranty

should have been in writing; but it is assumed throughout, by court and council, that if it had been in writing the defendant would have been liable, although there could have been no liability on the part of the principal.

In a similar manner, where one becomes a surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense on the part of the principal against which the surety assures the promisee: Yale v. Wheelock, 109 Mass. 502.

The bond in the case at bar is several as well as joint. It appears from it that Mrs. Winn is the wife of the obligee, and it recites the agreement made between them. This agreement made by her is void, so far as the case now discloses, solely because of her incapacity to contract; but this should not release the defendant from his engagement that she should perform the promise made by her. The defense which Mrs. Winn personally has, resulting from her situation, should not be open to him.

Nor do we perceive that any distinction can be made, as suggested by the defendant, between the promise of a married woman, which is void, and that of a minor, which is voidable. In either case, the surety assures the promisee against the incapacity of the principal to make a legal contract, whether it be more or less complete.

The cases in which it has been held that the coverture of the principal promisor at the time of making her promise will not discharge the surety, when such coverture was known to him, are numerous, and have arisen on many descriptions of contract: Smyley v. Head, 2 Rich. Eq. 590; 45 Am. Dec. 750; Kimball v. Newell, 7 Hill, 116; Nabb v. Koontz, 17 Md. 283; Jones v. Crosthwaite, 17 Iowa 393; Weed Sewing Machine Co. v. Maxwell, 63 Mo. 486; St. Albans Bank v. Dillon, 30 Vt. 122; 73 Am. Dec. 295; Davis v. Statts, 43 Ind. 103; 13 Am. Rep. 382; Stillwell v. Bertrand, 22 Ark. 375.

Exceptions sustained.

KYGER v. SIPE. 1892.

89 Va. 507; 16 S. E. Rep. 627.

Appeal from circuit court, Rockingham county.

Lewis, P. It is not necessary in the present case to consider what contracts of an infant are voidable, nor what is a sufficient disaffirmance or ratification, of such contracts. The subject was considered in Mustard v. Wohlford, 15 Grat. 329, and we need only refer to what was there said.

The principal question here is as to the effect upon the appellant's liability of the disaffirmance by E. J. Carrickhoff, who, at the date of the transaction in question, was an infant. Her contention is that that disaffirmance rendered those transactions, including the deed of trust, void *ab initio,* not only as to him, but as to her, as his surety. In support of this view, counsel refer to the language of Judge Moncure in Mustard v. Wohlford, where he said that where a voidable contract of an infant is disaffirmed by him "it is made void *ab initio,* and the parties revert to the same situation as if the contract had not been made." But this was not said in a case in which an infant was jointly bound with an adult. In such a case the liability of the latter is not affected by the plea of infancy, as is shown by the case of Wamsley v. Lindenberger, 2 Rand. (Va.) 478, and a multitude of cases which might be cited to the same effect; and the same rule applies where, in an action on a joint contract, coverture is pleaded; in either case the defense being of a wholly personal character. It is contended, however, that it is otherwise in the case of a surety, and the general rule is invoked that where there is no principal there can be no surety. But to this rule there are exceptions, one of which is that, if the principal is not liable by reason of a purely personal defense in the nature of a privilege or protection, as infancy or coverture, then the surety is not released, but the contract subsists as against him in full force. In such a case the disability of the principal may be the very reason why the surety was required, and consented to become bound. Brandt, Sur. 128; Bank v. Dillon, 30 Vt. 122; Sewing Mach. Co. v. Maxwell, 63 Mo. 486; Davis v. Statts, 43 Ind. 103. And if this be so where an infant is the only principal, *a fortiori* is it so where, as in the present case, there are two

principals, one of whom is an adult. Nor does it matter that the bonds and deed of trust in the present case were signed for the infant by a person not authorized to do so, for, if he himself had signed them, his right to disaffirm the contract after attaining full age would have been just the same. It is conceded that he was a joint purchaser of the sawmill and engine, and that he promised to pay therefor independently of the bonds; nor does the deed of trust in terms mention the bonds, and the suit is not upon the bonds, but to enforce the deed of trust. The case of Baker v. Kenntt, 54 Mo. 82, is relied on, but does not sustain the position for which it has been cited. In that case an infant purchased land, and gave his note, with sureties, for the purchase money. On coming of age, he disaffirmed the contract, and surrendered the premises, which he had improved, to the vendor. In an action on the note it was held that there could be no recovery against the sureties, not, however, because the principal was not liable, but because when the plaintiff got back the land the consideration for the note was extinguished. The court, so far from impugning the principle just stated, took occasion to emphatically confirm it, remarking that it was "undoubtedly correct that infancy does not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable undertakings," and that the cases in which this principle had been decided were clearly distinguishable from the case then before the court. In the present case there was no disaffirmance before the institution of the suit, and if, in any sense, there could be said to have been a surrender of the property, the consideration for which the deed of trust was executed has certainly not been extinguished.

LEE v. YANDELL. 1887.

69 Texas 34; 6 S. W. Rep. 665.

Commissioners' decision. Appeal from district court, Nolan county; William Kennedy, Judge.

Maltbie, J. The third charge was as follows: "If you find from the evidence that the defendant Yandell, at the time he signed the note sued on, was of unsound mind to such an extent

as to be unable to comprehend the nature, meaning, and effect of his act in signing such note, you will return a verdict for defendants." This was also assigned as error, and, being the only instruction given in reference to Yandell's sanity, it should be considered in the light of all the facts proven on the trial in reference to that subject. While it must be regarded as an imperfect presentation of the law of the case, as a general proposition it cannot be said to be incorrect; and the plaintiff not having called the attention of the court to other phases of the question, by asking appropriate instructions, ordinarily there would not be error in the omission. Farquhar v. Dallas, 20 Tex. 200; Gallagher v. Bowie, 66 Tex. 265. In this case, however, two other persons signed said note as sureties; and, under the charge, the jury found in favor of said sureties as well as the principal, Yandell. As a general proposition, whenever a principal on a note is discharged, his sureties will be also; but to this rule there are certain well established exceptions. For instance, the note of a married woman is generally held to be void; but if persons, not themselves under disability, sign the note of a married woman, without the payee having been guilty of fraud or deceit in procuring the signature of such married woman, the sureties would be liable, though the principal be discharged. 2 Daniel, Neg. Inst. § 1306a; Davis v. Statts, 43 Ind. 103; Allen v. Berryhill, 27 Iowa 534; Hicks v. Randolph, 3 Baxt. 352. The same principle has been extended to sureties on notes executed by infants, and it is believed that no valid reason can be given why sureties of a person of unsound mind should not be held liable under like circumstances, though the principal be discharged; especially so, when the payee of the note is ignorant of the fact that the principal is a lunatic, as, in such case, a recovery might be had even against the lunatic, if the payee acted in good faith. 2 Pom. Eq. Jur. § 946. The contract of a surety is that if the principal does not pay, he will; and sound policy, as well as the plainest principles of justice, demand that when there is a valid consideration, and the payee has done nothing to deceive or mislead either principal or surety, and the principal is held to be not liable on account of some disability existing at the time of the making of the contract, whether such disability be coverture, infancy, or unsoundness of mind, the surety should be held to the terms of his contract. The reason given, in some of the cases, why

the surety of a married woman is held, is that the payee and the surety knew at the time that the contract was made that the married woman might refuse to pay, and that the contract was made in reference thereto; the surety binding himself to pay in case she should avail herself of her legal rights. In case of a lunatic, it might be presumed that, if the payee knew of the disability, the sureties, being his close friends, would also know of it, and that the contract was made in reference to that state of facts. There was no evidence that Lee had in any manner deceived, over-reached, or defrauded Yandell in procuring him to sign the note; hence we are of opinion that the charge of the court should have been limited to Yandell, and the question submitted as to the liabilities of the sureties, on the principles herein enunciated.

CHAPTER V.

ABSOLUTE AND CONDITIONAL GUARANTIES.

a. *An absolute promise of guaranty requires no notice of acceptance.*

WILCOX v. DRAPER. 1881.

12 Nebraska 138; 10 N. W. Rep. 579.

Error to the district court for Knox county. Tried below before Barnes, J. The facts appear in the opinion.

Nelson J. Cramer and R. E. W. Spargus, for plaintiff in error, cited Revised Codes of Dakota (Civil Code) §§ 1654, 1659, 1688, 1895; Smith v. Dann, 6 Hill (N. Y.) 543; Union Bank v. Coster Executors, 3 New York 203; Douglass v. Howland, 24 Wendell 35; Whitney v. Groot, 24 Id. 82; Allen v. Rightmere, 20 Johns. 365; Horsen v. Pike, 16 Ind. 140; McNaughton v. Conklin, 9 Wis. 9; I. Parsons on Contracts 478 (note i); Id., 14 (note e); Parsons Mercantile Law 67.

Solomon Draper, *pro se.*

Maxwell, Ch. J.

This is an action upon a guaranty, of which the following is a copy:

"Niobrara, Neb., July 20th, 1878.

E. P. Wilcox, Esq., Yankton, D. T.

Dear Sir:—The bearer is Mr. E. Eldridge, of our town of Niobrara. He wishes to buy a bill of lumber for a house for myself and will want a short time on part of it. If you will accommodate him you will greatly oblige me and I will see you paid as he agrees. Any statement that he makes to you in regard to you and your brother starting a lumber yard here and purchasing wheat, you may depend upon. We are all quite anxious to have you go into that business here.

Very respectfully,

S. Draper."

The petition states, that on the faith of this guaranty, the plaintiff on the 24th of July, 1878, sold to said Eldridge a bill of lumber for the defendant's house, amounting to the sum of \$182.65, \$50.00 being paid at the time of receiving said lumber, and a credit of thirty days being given for the balance; that Eldridge executed a promissory note for \$132.65, payable at the First National Bank of Yankton, in thirty days from July 24th, 1878; that no part of the same has been paid, and that after said note became due, the plaintiff recovered judgment against Eldridge for the amount of same; that an execution was duly issued on said judgment and returned wholly unsatisfied, etc. A demurrer to the petition was sustained in the court below and the action dismissed. The cause is brought into this court by petition in error.

There is no allegation in the petition that Draper was notified of the acceptance of the guaranty. And it is claimed that such an allegation is necessary to entitle the plaintiff to recover.

In Douglass v. Reynolds, 7 Peters, 113-129, the action was upon the following guaranty:

"Port Gibson, December, 1807.

Messrs. Reynolds, Byrne & Co.,

Gentlemen: Our friend, Mr. Chester Haring, to assist him in business may require your aid from time to time, either by acceptance or endorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so. Your obedient servants,

James S. Douglass,
Thomas G. Singleton,
Thomas Going."

On the trial of the cause in the circuit court the defendants asked the court to instruct the jury "that to entitle the plaintiffs to recover on said letters of guaranty, they must prove that notice had been given, in a reasonable time after said letters of guaranty had been accepted by them, to the defendants that the same had been accepted." The opinion of the court was delivered by STORY, J., who says: "It is sufficient for us to declare, that in point of law the instruction asked was correct and ought to have been given. A party giving a letter of guaranty has a right to know whether it is accepted or not. It may be most material, not only as to his responsibility, but as to his future rights and proceedings. It may regulate in a great measure his course of conduct and his exercise of vigilance in regard to the party in whose favor it is given." The judgment was reversed, because of this and an erroneous instruction given. The case was again before the court in 1838, and is reported in 12 Peters 497-506, and the rule as to notice adhered to.

In Lee v. Dick, 10 Peters 482, the action was brought on the following guaranty, contained in a letter addressed to the plaintiffs:

"Gentlemen: Nightingale and Dexter of Henry county, Tenn., wish to draw on you at six and eight months. You will please accept their draft for $2,000.00, and we do hereby guaranty the punctual repayment of it."

It was held that the party accepting was bound to give notice of his intention to accept and act under the guaranty, if not at once, at least within a reasonable time.

In Adams v. Jones, 12 Peters 207, STORY, J., in delivering the opinion of the court says: "We are all of the opinion that notice is necessary; and that is not now an open question in this court, after the decisions which have been made in Russell v. Clarke, 7 Cranch, 69; Edmundson v. Drake, 5 Peters, 624; Douglass v. Reynolds, 7 Peters, 113; Lee v. Dick, 10 Peters, 482, and again recognizing it at the present term in the case of Reynolds v. Douglass. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself againt losses, which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity, to compel the other parties to discharge him from future responsibility."

In the case of the Louisville Manf'g Co. v. Welch, 10 Howard

461-475, the court say: "The rule requiring this notice within a reasonable time after the acceptance, is absolute and imperative in this court, according to all the cases; it is deemed essential to the inception of the contract."

These decisions have been followed by the courts of a number of the states. Mussey v. Raynor, 22 Pick. 223; Kay v. Allen, 9 Barr. 320; Kinchela v. Holmes, 7 B. Monroe 5; Lowe v. Beckwith, 14 Id. 184; Taylor v. Wetmore, 10 Ohio 490; Rankin v. Childs, 9 Mo. 674; Lawson v. Townes, 2 Ala. 373; Walker v. Forbes, 25 Id. 139; Fay v. Hall, Id. 704; Hill v. Calvin, 4 How. (Miss.) 231.

An examination of these cases will show that no distinction is made between a guaranty and an offer of guaranty. The same rule is applied to both. It will also be found that there is great uncertainty as to what in point of time will be sufficient notice, and what will dispense with it altogether.

In Douglas v. Howland, 24 Wend. 35-49, it is denied that this doctrine has the sanction of the courts of England, or is founded on correct principles. COWEN, J., in reviewing the authorities as to notice, where the parties are acting under commercial guaranties, shows that the cases holding notice to be necessary are not sanctioned by the principles of common or commercial law, but must stand upon the reason of the rule. He says: "I am aware that there are a class of cases which hold that under a contract guaranteeing a debt, yet to be made by another, the guarantor is not liable to a suit without notice that the guaranty has been accepted and acted upon. Indeed, they go farther; if notice of accepting the guaranty be not given within a reasonable time, no debt whatever arises. Babcock v. Bryant, 12 Pick. 133. I will only say, that these cases have no foundation in English jurisprudence, where the adjudications are numerous and clear the other way. Harris v. Ferrand, Hardr., 36, 42. In Com. Tit. Plead. C. 75, it is said on a promise to pay, on the performance of an act by the promisee to a third person, the promisee need not give any notice; for the promisor takes it on himself to get notice at his peril. And vide as to a guaranty of a debt already due. Warrington v. Furber, 8 East. 242; Swinyard v. Bowes, 5 Maule & Sel. 62. All the cases requiring mere guarantors to be treated as endorsers, rest on dicta of two distinguished American judges, in cases of mixed character, where the defense, it was agreed,

would be complete, independent of any such ground. MARSHALL, Ch. J., in Russell v. Clark's Ex'rs, 7 Cranch 69, 72; STORY, J., in Cremer v. Higginson, 1 Mason 323, 340; Russel v. Perkinds, Id. 368, 371; and Rapelye v. Bailey, 3 Conn. R. 438. The counsel cited no English books, and all the learned court found there was one case, in which they remark, that EYRE, C. J., seemed to have been of opinion that, in guaranties for good behavior, notice of any embezzlement ought to be given in a reasonable time. Peel v. Tatlock, 1 Bos. & Pull. 419. The decision was finally rested on the dictum of Chief Justice MARSHALL, and was very strong in favor of the guarantor. It was on a guaranty to pay for goods deliverable to another, on such terms as the guarantee and the principal should agree on, if the principal did not pay; and though strictly followed by a sale and delivery to the principal and a default on his part to pay, it was held that no action would lie; at least, till notice of the circumstances had been given by the plaintiff to the surety. Other cases hold guarantees of this character to almost the same degree of strictness in giving notice to guarantors, as the law merchant has introduced between indorsees and indorsers. Green v. Dodge, 2 Ham. R. 430, 439, 440; Norton v. Eastman, 4 Greenl. R. 521. In the latter case, a like principle was imputed to a decision of this court in Stafford v. Low, 16 Johns. 67. The latter, however, merely holds that a declaration made to another of a willingness to become a guarantor, if required, would not render the declarant liable as a guarantor, without a compliance with the express condition, which means giving notice. In short, that the letter on which the plaintiff based his claim did not amount to a guaranty. Id. 69, 70. McIver v. Richardson, 4 Maule & Selw. 667, was there cited as a case of similar character. Beekman v. Hale, 17 Johns. R. 134, puts both of the former cases on that footing, and acts upon them, adding, there must be notice or a subsequent consent to become a guarantee. Such cases are exceptions to the general rule, that notice is not required. They are cases of express condition, like Birks v. Tippet, already cited from Saunders. And vide 1 Saund., 33 note, (2); Com. Dig. Plead. C. 69. It is proper to say that this place in Comyn's Digest is cited by PUTNAM, J., in Babcock v. Bryant. But the cases cited by Comyn are like those in the note 1 Saund. 33, where the request or notice is expressly required. "There" says Sergeant Williams, "the request

is parcel of the contract." All the cases cited by him are of collateral matters, to be done on request, by the very words of the contract, and even these cases do not extend to a proper debt or duty of the party promising. There, though he by words, make the request or notice a condition, yet the bringing of the action is a sufficient notice, and such is the very first case cited in the note. Yelv. 66. Vide Com. Dig. Plead. C. 70. I forbear to search further for the English law, after the admission implied by Douglass v. Reynolds, 7 Peters 113, 125. The question was there examined by Mr. Justice STORY. The only English cases cited by him, are: Oxley v. Young, 2 H. Black 613, and Peel v. Tatlock, the latter being also noticed, as mentioned before, by the supreme court of Connecticut. In Oxley v. Young, the surety was holden liable; and I do not find any countenance given to the idea, that notice was necessary by way of condition. The defendant ordered goods for another, and guaranteed that he should pay for them. They were accordingly shipped to him by the plaintiff, the guarantee. It is true that notice of the shipment was given to the defendant; and he sought to raise a defense, on the subsequent neglect of the vendor. EYRE, C. J., said the right to sue on the guaranty attached when the order was put in a train for execution, subject to its being actually executed, and the right could not be divested, even by the wilful neglect of the vendor. As to Peel v. Tatlock, it has been impossible for me to perceive that even an intimation was intended of notice being essential. The difficulty felt by EYRE, C. J., seems to have been, whether the creditor had not defrauded the guarantor by industrious concealment. I may then, I think, repeat with great confidence, that all the cases requiring notice are American, and depart from the rule of the common law. Douglass v. Reynolds, may be sustained by the dictum of C. J. MARSHALL; and indeed by Edmundston v. Drake, 5 Pet., 624, where the court, with that learned chief justice at its head, carried the dictum into a direct adjudication. No English case is claimed by Mr. Justice STORY, in any of his decisions, as sustaining the doctrine in the least. C. J. MARSHALL does not even cite one in his opinions. The short answer which English cases, decided long before our revolution, furnish, is, that the guarantor by inquiring of his principal, with whom he is presumed to be on intimate terms, may inform himself perfectly, whether the guaranty were accepted, the con-

ditions fulfilled, and payment made. Where that can be done, the cases all hold that notice is not necessary, even as preliminary to the bringing of an action, much less to found a right of action. The only exception is the well known one of collateral parties to bills of exchange or promissory notes. Vide Phillips v. Astling, 2 Taunt. 206."

The supreme court of Ohio in Powers and Weightman v. Bumcratz, 12 Ohio State 284, after quoting a portion of the above opinion, say: "We have carefully examined the cases of Oxley v. Young, 2 H. Bl. 613, and Peel v. Tatlock, 1 Bos. & Pull. 419, and cannot see how the fairness and correctness of the comment upon them of Cowen, J., before quoted, can be denied or disputed. If there be English cases sustaining the doctrine of Douglass v. Reynolds, they have not been cited in the decisions of the courts of the United States. In several of the cases decided in the state courts English cases are cited. In Craft v. Isham, 13 Conn., 28, 39, which, though decided before Douglass v. Howland, had not been reported, and is therefore not referred to by Cowen, J., it is said, as to the decisions in Douglass v. Reynolds, and Adams v. Jones, that, "so far from being opposed to, or unsupported by, authorities, they are founded on principles which have long since been settled, and are familiar in Westminster Hall. We barely refer to the authorities." The cases cited are: McIver v. Richardson, 1 Maul. & Sel. 557; Gaunt v. Hill, 1 Stark. Ca. 10; Symons v. Want, 2 Stark. Ca., 371; Payne v. Ives, 3 Dowl. & Ry., 664; Glyn v. Hertel, 8 Taunt. 208; Bacon v. Chesney, 1 Stark. Ca. 192; Combe v. Wolf, 8 Bing. 156; Phillips v. Astling, 2 Taunt. 206; Morris v. Cleasby, 4 Maul. & Sel. 566. The bearing on the point of some of these cases it is difficult to perceive. Bacon v. Chesney was the case of a guaranty for goods to be sold on eighteen months credit, and it was claimed that there had been a credit of only twelve, but it being shown there was a mistake, the plaintiff recovered. In Coombe v. Woolf, the guarantor was held to be discharged by the giving time without his consent. In Phillips v. Astling, the guaranty was the price of goods to be paid by a bill, and the question was as to notice of its non-payment. In Morris v. Cleasby, there had been a sale by a factor on a *del credere* commission. It was said such a commission pre-supposes a guaranty, and that the obligation of the factor arises on the

guaranty. "The guarantor is to answer for the solvency of the vendee, and to pay the money, if the vendee does not; on the failure of the vendee he is to stand in his place, and to make his default good. Where the form of the action makes it necessary to declare upon the guaranty, application to the principal must be stated on the record. In all cases it must, if required, be proved, though in the case of a foreigner, very slight evidence may be sufficient." 4 M. & S. 574. It will be seen that in none of these cases is there anything as to the acceptance of a guaranty, and so far as any of them bear on the doctrine of notice imposed by the contract, and that in reference to a collateral liability for the payment of a bill of exchange. 2 Taunt. 206.

The supreme court of Ohio in the case cited, after an elaborate review of the cases, overruled Taylor v. Wetmore, 10 Ohio 490. The court say, page 262: "We are aware of the importance of adhering to former decisions, but do not think we are bound by an opinion which it was not necessary to express and evidently was expressed without a thorough consideration of the question."

The guaranty in McIver v. Richardson, was in these words: "I understand A. & Co., have given you an order for rigging, etc., which will amount to about four thousand pounds. I can assure you from what I know of A's honor and probity, you will be perfectly safe in crediting them to that amount; indeed I have no objection to guaranty you against any loss from giving them this credit." The court say the question was "whether the paper imports to be a perfect and conclusive guaranty. The paper therefore must be construed according to the plain natural import of its terms. The import is, that the party signing it understood that A. & Co. had given an order for goods amounting to about £4,000.00; that this order remained unexecuted; and then, as if a question had been put to the defendant respecting the honor or probity of A. & Co., the defendant says: I assure you from what I know of A. you will be perfectly safe in crediting them to that amount; and then added: indeed, I have no objection to guaranty you against any loss from giving them credit; which words import, that if application was made he would guaranty, etc. Considering this as a mere overture to guaranty, it appears to us that the defendant ought to have had notice that it was so regarded, and meant to be accepted, or

that there should have been a subsequent assent on his part to convert it into a conclusive guaranty." 1 M. & S., 563.

In Symons v. Want, 2 Stark., 371, the offer of guaranty was as follows: "I have no objection to guaranty the payment of the rent as far as that of each quarter during Mr. T. Want's continuance in possession." The court directed a non-suit upon the ground that it was a mere offer to guaranty, and no request to guarantee or notice of acceptance of the offer was proved. See also Mozley v. Tinkler, 1 C. and M., 692.

But it may be said that the guaranty in this case being indefinite as to the amount of the debt, and time for which credit should be given, notice was therefore required. This question was raised in Powers and Weightman v. Bumcratz. The court say, pages 291-2: "We have examined some of those cases, in which the guaranty being indefinite as to the amount and time of the advances, something might be expected in the pleadings, or points made, as to the notice of the acceptance of the guaranty, but nothing of the kind appears. Johnson v. Nichols, 1 C. B. 251; Chapman v. Sutton, 2 Id. 634; Boyd v. Moyle, Id. 644; Martin v. Wright, 6 Q. B. 917; Bell v. W. P. Bank of England, 9 C. B. 154; Harlor v. Carpenter, 3 J. Scott 172; Hitchcock v. Humfrey, 5 M. & G. 559; Mayer v. Isaac, 6 M. & W. 605; Liverpool Borough Bank v. Eccles, 4 H. & N. Exch. 139; Allen v. Kenning, 9 Bingh. 618.

In the case of White v. Woodward, 5 C. B., 810, 814, it was claimed by counsel that: "The declaration should have averred notice to the defendant within a reasonable time after the supply of the goods." He said this question was first broached in Peel v. Tatlock, 1 B. & P. 419, and notice held necessary by Dr. Story in Cremer v. Higginson, 1 Mason, 323, and 1 Story, R. 22, 33. CRESSWELL, J., said: "Suppose the defendant had no notice of the supply to Slater, and no notice of the non-payment by him, until the amount was demanded of him. What then?" The counsel replied: "The demand, if within a reasonable time, would be notice." Wilde, C. J., "You do not show that it was not within a reasonable time. The defendant was liable *ipso facto,* upon Slater's failure to pay." Such is the only mention of the doctrine as to notice of acting on a guaranty, we have been able to find in the English reports.

In the case of Smith v. Dann, 6 Hill, 543, the guaranty was as follows:

"Avon, October 10, 1840.

Messrs. F. F. Smith & Co.

Gentlemen: If you will let Messrs. Steele and Wall of this village, grocers and bakers, have one hundred dollars in goods at your store on a credit of three months, you may regard me as guarantying the payment.

Yours truly,

AMOS DANN."

It was held that no notice was necessary. The court say: "The defendant invited the plaintiffs to sell goods to Steele and Wall, on his promise to guaranty the payment of the debt. The plaintiffs assented and delivered the goods. The proposition of one party was accepted by the other; and according to our notions of the law, this made a complete contract. Nothing further was necessary to its consummation. If the defendant wanted notice, and did not get it from the persons whom he thought worthy of credit, it was his business to enquire and ascertain what had been done. There is nothing in the defendant's undertaking which looks like a condition, or even a request, that the plaintiffs should give him notice if they acted upon the guaranty, and there is no principle upon which we can hold that notice was an essential element of the contract.

The cases of Beckman v. Hale, 17 Johns, 134, and Stafford v. Low, 16 Id., 67, went upon the ground that there was nothing more than an overture or proposition. But here the undertaking was absolute."

In the case of the Union Bank v. Coster's Executors, 3 Comstock 203, the letter of credit and guaranty were as follows:

"New York, 29th May, 1841.

Sir: We hereby agree to accept and pay at maturity any draft or drafts on us at sixty days sight, issued by Messrs. Kohn, Daron & Co., of your city, to the extent of twenty-five thousand dollars, and negotiated through your bank. We are respectfully, sir,

Your obedient servants,

HECKSHER & COSTER."

At the foot of the letter of credit was the following guaranty: "I hereby guarantee the due acceptance and payment of any draft issued in pursuance of the above credit, John G. Coster."

The court say: "We must hold the law to be settled in this state that where the guaranty is absolute, no notice of acceptance is necessary. Judge COWEN in Douglass v. Howland, 24 Wend. 35, and Judge BRONSON in Smith v. Dann, 6 Hill, 543, examined the cases at length upon this question, and showed conclusively that by the common law no notice of the acceptance of any contract was necessary to make it binding, unless it be made a condition of the contract itself, and that contracts of guaranty do not differ in that respect from other contracts.

In Carman v. Ellege, 40 Iowa 407, and Case & Co. v. Howard, 41 Id. 479, it was held that a direct promise of guaranty requires no notice of acceptance. See also Farmers & Mechanics Bank v. Kerchival, 2 Mich. 504; Thrasher v. Ely, 2 S. & M. 141; Williams v. Stanton, 5 Id. 347; Wadsworth v. Allen, 8 Grattan, 504; Moore v. Holt, 10 Id., 284-296; 2 Am. Leading Cases 103.

The question here involved is presented to this court for the first time. A desire to conform our rulings, where the authorities are conflicting, to those of the supreme court of the United States, and thus secure uniformity of decisions, inclines us to follow the cases decided by that court. But it is of much greater importance that decisions shall be based upon sound principles and correct law. The rule as to notice in case of guaranty was unknown to the common law, yet it is sought to engraft it on our jurisprudence as a common law rule,—to attach conditions to the contract of guaranty which are not applied to other contracts. When a proposition of guaranty of one party is accepted by the other, this makes a complete contract. The proposition is made to the person of whom the credit is desired, and he accepts it. Upon what principles of law can it be said that this proposition, which was intended to be accepted and to take effect from that date, should not be binding on the guarantor without notice? The guarantor makes the person whom he vouches for and thinks worthy of credit, so far his agent as to transmit the written guaranty by him. Is it not the business of the guarantor to enquire of him about what has been done under the guaranty? We think it is. We therefore hold that a direct promise of guaranty requires no notice of acceptance. The judgment of the district court is reversed and the cause remanded for further proceedings.

Reversed and remanded.

PLATTER v. GREEN. 1881.

26 Kan. 252.

Error from Cowley District Court.

At the December Term, 1880, of the district court, M. T. Green, E. T. Williamson and Geo. L. Pratt, partners as the Chicago Lumber Company, recovered a judgment against Jas. E. Platter and two others, who bring the case here. The opinion contains a statement of the facts.

The opinion of the court was delivered by VALENTINE, J.: This cause was tried in the court below upon the following agreed statement of facts:

"Now come the parties to the above-entitled cause, by their respective attorneys, and submit said cause to the court for its decision and judgment, on the following agreed statement of facts, to wit:

"1st. That at the commencement of this action, and at the several times hereinafter mentioned, the plaintiffs were and now are copartners, doing business under the firm-name of the Chicago Lumber Company, and were engaged in the business of selling lumber and building materials, at wholesale and retail, in the city of Wichita, Sedgwick county, Kansas.

"2nd. That at the several times hereinafter mentioned, the defendant, T. A. Wilkinson, was engaged in the business of selling lumber and building materials in the city of Winfield, Cowley county, and state of Kansas.

"3d. That the said T. A. Wilkinson, defendant, desiring to obtain of the plaintiffs lumber and building materials on credit, and having requested the plaintiffs to furnish him such lumber and building materials, and the plaintiffs having declined so to do unless the said Wilkinson should furnish security for the payment of the same, the said Wilkinson afterward and on the 11th day of March, 1878, presented an instrument in writing to the defendants Platter, Troup, and Curns, with the request that they execute the same, which they did execute on the day aforesaid, and deliver to the said Wilkinson, who on the same day delivered said instrument to the plaintiffs, a copy of which instrument is as follows:

" 'Winfield, Kansas, March 11, 1878.

" 'We hereby authorize the Chicago Lumber Company, of Wichita, Kansas, to furnish to T. A. Wilkinson such building materials as he may wish, not exceeding the value of two thousand dollars at once; and if the said T. A. Wilkinson shall fail to pay for the same, either in money or material received from the Chicago Lumber Company, then upon ninety days' notice we agree to pay to the Chicago Lumber Company the amount remaining due from T. A. Wilkinson to the Chicago Lumber Company.

" 'T. A. WILKINSON.

JAS. E. PLATTER,
M. G. TROUP,
J. W. CURNS.'

"4th. That in reliance on said written instrument, the plaintiffs furnished said Wilkinson from time to time between the 11th day of March, 1878, and the 19th day of December, 1878, both days inclusive, such building materials as he wished, that the account hereto attached and marked 'Exhibit A' is a true and correct statement of the account kept by the plaintiffs with the said Wilkinson, and shows correctly the respective values of the several amounts of lumber and building materials, and the respective dates thereof, furnished by the plaintiffs as aforesaid, between the 11th day of March and the 19th day of December, 1878, both days inclusive, to the said Wilkinson, as well as the payments made by the said Wilkinson to the plaintiffs on account of such lumber and building materials, between the 11th day of March, 1878, and the 14th day of January, 1878, both days inclusive, and the respective dates of such payments.

"5th. That on the 14th day of January, 1879, the plaintiffs and said Wilkinson had a full and complete settlement of their transactions growing out of the furnishing of the lumber and materials aforesaid, and in such settlement it was mutually ascertained and agreed by and between the plaintiffs and said Wilkinson, that there was due and payable from the said Wilkinson to the plaintiffs, on account of the lumber and building materials so furnished, a balance of $1,999.41, which the said Wilkinson then and ever since has failed to pay to the plaintiffs.

"6th. That for the purposes of this action it is agreed and understood that the settlement had by and between the plaintiffs and the said Wilkinson, and mentioned in the above fifth subdivision of this agreement, was correct, and that the said balance

there mentioned of $1,999.41 was the amount justly due from the said Wilkinson to the plaintiffs at the time of said settlement.

"7th. That neither of the defendants, Platter, Troup, or Curns, nor either of them, had any notice or knowledge whatsoever that the plaintiffs had accepted the guaranty contained in said written instrument, or that plaintiffs had furnished said Wilkinson any lumber or building materials thereunder, or that said Wilkinson had made default in the payment of the balance due from him as aforesaid to the plaintiffs, until the 10th day of April, 1879; that on the day last aforesaid the plaintiffs served on the defendants Platter, Troup and Curns, severally, a written notice, of which the following is a copy, to-wit:

" 'Wichita, Kansas, April 10, 1879.

Mr. T. A. Wilkinson, in account with Chicago Lumber Company.

(Established 1866. Douglas Avenue, near depot.)

To balance .... $1,999.41.

" 'Messrs. M. G. Troup, J. E. Platter, J. W. Curns: Please take notice, that Mr. T. A. Wilkinson has failed to meet the above liability, and that we look to you for payment within ninety days from receipt of this notice.

" 'Yours, &c., CHICAGO LUMBER COMPANY.'

"That the defendant Wilkinson, at several times during the furnishing of lumber and building materials aforesaid, was indebted to the plaintiffs in excess of two thousand dollars, on account of such lumber and building materials, as shown by said 'Exhibit A'; that no part of said sum of money has been paid.

"That this cause shall be submitted and determined on the foregoing facts, and if it is determined that on such facts the plaintiffs are entitled to recovery in the action, the amount of the recovery shall be nineteen hundred and ninety-nine 41/100 dollars, and seven per cent. interest thereon from the 10th day of July, 1879."

Upon the foregoing facts, the court below found the issues in favor of the plaintiffs and against the defendants, and rendered judgment accordingly; and three of the defendants, Platter, Troup and Curns, now bring the case to this court for review. They claim that the court below erred for various reasons:

1. They claim that the written instrument sued on was only

a proposition or offer to guarantee payment for the value of the building materials to be furnished by the plaintiffs below to Wilkinson, and that as no notice of the acceptance of such proposition or offer of guaranty was given by the plaintiffs to them at any time before the lumber was furnished, or indeed at any time afterward, that therefore the written instrument never became a binding contract, and therefore that they never became liable on account of the same.

2. That even if said written instrument became a binding contract, still, that the guaranty contained therein was not a continuing one, but that it simply authorized the furnishing of building materials at only one time, and that all the building materials furnished at such time had been fully paid for.

3. That even if the written instrument was a binding contract without said notice, and even if the guaranty contained in the written instrument was a continuing one, still, that the plaintiffs never gave to the defendants Platter, Troup and Curns, any notice of the advances made to Wilkinson of any such building materials, and therefore that they were released from all obligation on their guaranty.

4. That under said written instrument the plaintiffs had no authority to ever permit Wilkinson's credit to exceed the sum of two thousand dollars, and that the plaintiffs, by permitting such credit to exceed that sum, released the defendants Platter, Troup and Curns, who were only sureties.

5. That the plaintiffs never gave the defendants Platter, Troup and Curns, any reasonable notice of any default in payment made by said Wilkinson, and therefore, for that reason also, they were released from their guaranty.

It will be seen that the decision of this case can amount to but little more than merely a construction or interpretation of the written guaranty of the defendants Platter, Troup and Curns. What does the guaranty mean? It may properly be divided into three parts: first, the grant of authority to the Chicago Lumber Company to furnish the materials; second, the limit in the amount of the value of materials to be furnished; third, the terms and conditions of payment. The guaranty will then read thus:

1. "We hereby authorize the Chicago Lumber Company, of

Wichita, Kansas, to furnish to T. A. Wilkinson such building materials as he may wish,

2. "Not exceeding the value of two thousand dollars at once;

3. "And if the said T. A. Wilkinson shall fail to pay for the same, either in money or materials received from the said Chicago Lumber Company, then upon ninety days' notice we agree to pay to the Chicago Lumber Company the amount remaining due from T. A. Wilkinson to the Chicago Lumber Company."

We shall examine the above claims of error in the order above mentioned.

1. We think that the written instrument sued on was, in one sense, only a proposition or offer to guarantee payment for the value of the building materials to be furnished by the plaintiffs below to Wilkinson; but not in the sense as claimed by the defendants below. The guaranty did not depend for its force and validity upon any notice subsequently to be given by the plaintiffs to the defendants, but depended solely upon the fact of the plaintiffs accepting the security furnished by the written guaranty, and delivering the building materials under it. It was evidently intended by the parties that the guaranty should be complete and absolute, without any such notice. The guaranty reads: "We hereby (that is, by this instrument, and without requiring a subsequent notice) authorize (that is, now authorize, using the word in the present tense) the Chicago Lumber Company, of Wichita, Kansas, to furnish to T. A. Wilkinson such building materials, upon ninety days' notice being given of the amount due for such building materials." It will therefore be seen that the question of notice was considered by the parties, and the only notice mentioned in the contract was the one with regard to payment for the materials furnished. If any other notice had been desired by the defendants, they would undoubtedly have provided for it in their written guaranty. After providing for one notice in their written guaranty, it can hardly be supposed that they intended that some other notice should also be given to them, and one which they did not mention in their written guaranty.

We think the guaranty was complete and absolute as soon as it was accepted by the plaintiffs, without any notice of such acceptance being given to the defendants. We are aware that

there is a great conflict among the authorities with regard to guaranties of a similar character to this. See Farmers &c. Bank v. Kercheval, 2 Mich. 504; Powers v. Bumcratz, 12 Ohio St. 273; Douglas v. Howland, 24 Wend. 35; March v. Putney, 56 N. H. 34; 1 Parsons on Contract, 479; Wade on Notice, § 388, *et seq.*, also § 404.

It is also claimed that the guaranty was not a continuing one, but was so limited that building materials could be furnished only at one time. This, we think, is an erroneous interpretation of the contract. The contract says: "We hereby authorize the Chicago Lumber Company of Wichita, Kansas, to furnish to T. A. Wilkinson such building materials as he may wish." This is an authority to furnish building materials without any limit as to time, amount, or value. The defendants, however, after giving this unlimited authority, then limit the same by using the words "not exceeding the value of two thousand dollars at once."

Wilkinson was a retail dealer in building materials at Winfield, and the Chicago Lumber Company was a wholesale dealer in building materials at Wichita; and Wilkinson, desiring to purchase building materials of the Chicago Lumber Company on credit, to enable him to carry on his business at Winfield, procured this guaranty from the defendants, in order to obtain such building materials as he might want for his business; and evidently the defendants, contemplating that the Chicago Lumber Company would furnish to Wilkinson building materials at various times, inserted the limitation that they might furnish such building materials as he might wish, but "not exceeding the value of two thousand dollars at once," the words "at once" evidently meaning "at one and the same time."

We think this limitation, fairly construed, would prevent the Chicago Lumber Company from furnishing to T. A. Wilkinson on the credit of the defendants building materials to an amount exceeding at any one time the value of two thousand dollars; and this whether the building materials were procured at only one time or at several times. But we do not think that this limitation confines the parties to one transaction alone. There is also a great conflict among the authorities upon the question of continuing and limited guaranties, some authorities holding one way, and some another; but we think under the language of the

present guaranty, there is not much room for any interpretation other than that above indicated. We would refer to the following authorities, among others: Gates v. McKee, 13 N. Y. 232; Ringe v. Judson, 24 N. Y. 64; Brandt on Suretyship and Guaranty, § 130, *et seq.*

If the said written instrument was a binding contract without notice of the acceptance of the guaranty, and if the guaranty was a continuing one, then no notice was required to be given to the defendants, except the one provided for in the written instrument, and except such as was necessary to enable them to avoid any loss that might occur on account of the insolvency of Wilkinson. We think this principle is so well settled that it will need no further consideration; and as it is not shown that the defendants have suffered any loss on account of failure to give such notice, we do not think that this point is well taken.

II. We do not think that it was intended by the written instrument to prevent Wilkinson from purchasing more than two thousand dollars' worth of building materials from the Chicago Lumber Company, or to prevent him from becoming indebted to said company in the sum of more than two thousand dollars; but it was simply intended to prevent him from purchasing, at any one time, more than two thousand dollars' worth of building materials on the credit of the defendants, Platter, Troup, and Curns, and from creating any liabilty against them at any one time for more than that amount. The limitation contained in the written guaranty we think was simply intended as a limitation upon the liability of the defendants Platter, Troup, and Curns, confining such liability to $2,000. We therefore think that this point is not well taken.

III. The plaintiffs gave to the defendants Platter, Troup, and Curns, the notice that was provided for in the written guaranty; and we think that that was sufficient.

Taking the whole case together, we perceive no error, and the judgment of the court below will be affirmed.

All the Justices concurring.

End

NADING v. M'GREGOR. 1890.

121 Ind. 465; 23 N. E. Rep. 283.

COFFEY, J. On the 30th day of July, 1885, the appellee executed the following instrument of writing, viz.: "Office of J. A. McGregor, manufacturer and dealer in oil barrel staves. Columbus, Ind., July 30th, 1885. Mr. Nading, Esq., Hope, Indiana—Dear Sir: I have made a contract with Stephen A. Douglass for a lot of staves to be delivered at Hope, Ind. Any white or burr oak timber you may sell him I will stand good for, or, in other words will guaranty the pay for it. Yours truly, J. A. McGregor." The appellant filed a complaint in the Bartholomew circuit court consisting of two paragraphs, each of which is based upon the above instrument of writing. The first paragraph alleges the execution of said writing by the appellee upon the consideration that the appellant would sell certain white oak and burr oak timber to Stephen A. Douglass; that the appellant accepted the promise therein contained, and on the faith thereof sold to the said Douglass certain white oak and burr oak timber at prices agreed upon between him and the said Douglass, amounting to $500, a bill of particulars of which is filed with the complaint; that, although often requested so to do, the appellee fails and refuses to pay for the same and that the said sum is due and unpaid. The second paragraph alleges that, in consideration that appellant would sell and deliver to Stephen A. Douglass certain white oak and burr oak timber, the appellee guaranteed and promised the appellant, by the writing above set out, that he would be answerable for and stand good for the payment for said timber at the prices agreed upon between the appellant and the said Douglass; that he sold timber to said Douglass at an agreed price of $500 on the faith of said guaranty; that the said Douglass has not paid for the same, although often requested so to do, nor has the appellee paid for the same, though often demanded and requested so to do, and that the said sum is due and unpaid. To this complaint the appellee filed an answer, consisting of one paragraph, in which after admitting the above writing, he avers that immediately after the delivery of the same to the appellant, without any notice to the appellee of its acceptance, the appellant sold and delivered to the said Stephen

A. Douglass the staves and timber mentioned in the complaint, under and in pursuance of a contract made between said appellant and the said Douglass, which said contract is in the words and figures following, to-wit: "Hope, Indiana, August 3rd, 1885. This is to certify that I, this third day of August, 1885, have sold to Stephen A. Douglass white oak and burr oak lumber enough for one hundred thousand (100,000) first class oil barrel staves, for which the said Stephen A. Douglass agrees to pay $10.00 per thousand in the tree, and the said staves to be paid for when gotten out and delivered at Hope, Indiana; and pay-day shall be on Saturday. I shall have my choice of taking stave count or log measure for logs in Hitchcock's mill-yard. Simon Nading." That he never received any answer from said written proposition of guaranty mentioned in appellant's complaint, and did not know that the appellant had accepted the same or was relying thereon, until the 30th day of December, 1885, when appellant sent appellee a statement of the account between appellant and the said Douglass and demanded payment of the same; that at the time of said notice and demand said Douglass had sold all of said staves and timber, and had received the pay therefor, and was wholly insolvent and financially worthless, and soon thereafter removed from Bartholomew county, and his place of residence is now unknown; that if appellant had notified appellee of his acceptance of said guaranty within a reasonable time, appellee could have secured himself; that he did not know, and had no notice whatever, of appellant's intention to hold him upon said proposition of guaranty until the aforementioned time; that said Douglass was and still is indebted to the appellee and he has no means of securing the same, or the appellant's claim. The court overruled a demurrer to this answer, to which the appellant excepted.

The appellant filed a reply in two paragraphs. The first paragraph consists of a mere repetition of the allegations contained in the complaint. It is alleged in the second paragraph that on the 30th day of July, 1885, the appellee had contracted with said Douglass for the purchase of 100,000 staves to be delivered at Hope, Ind.; that at that time said Douglass had no staves with which to fill said contract, and was wholly dependent upon appellant and others to sell him timber with which to fill his contract with appellee; that said Douglass was wholly insol-

vent, as was well known to both appellant and appellee; that on account of such insolvency appellant refused to sell him timber; that appellee was pecuniarily interested in said contract and in the purchase of said timber by the said Douglass; that when manufactured into staves the same was to be delivered to the appellee, under his said contract with the said Douglass; that appellee, for the sole purpose of receiving the benefit of his said contract with the said Douglass, and for the purpose of procuring the staves contracted to be sold by the said Douglass to him, as aforesaid, made and delivered to the appellant the writing set out and filed with the complaint; that relying on the promises therein contained, he delivered to the said Douglass a large amount of oak timber to-wit, enough to make 75,000 staves of the value of $500 all of which was received by the appellant; that said Douglass was wholly insolvent, and failed to pay for the same, and that appellee fails and refuses to pay for the same. The court sustained a demurrer to each paragraph of said reply, and the appellant excepted. On leave given, the appellant filed a third paragraph of complaint, which contains substantially the same allegations as those contained in the second paragraph of the reply above set out. The appellee extending the answer above set forth so as to cover this third paragraph of the complaint, the court again overruled a demurrer thereto, and, refusing to plead further, the appellee had judgment for costs. The assignment of errors calls in question the above several rulings of the court.

It is earnestly contended by the appellant that the instrument above set out dated July 30, 1885, is not a strict guaranty, but constitutes an original undertaking on the part of the appellee to pay for any white or burr oak timber purchased by Douglass from the appellant, and that, as it is an original undertaking on the part of the appellee no notice either of its acceptance, or of the failure of Douglass to pay, was necessary in order to bind the appellee. On the other hand, it is contended with equal earnestness on the part of the appellee that said instrument of writing amounts to nothing more than a mere proposition to guaranty the payment for timber purchased by Douglass, and that it was not binding on the appellee until notice of its acceptance, and that in any event, to bind the appellee, the appellant should have notified him within a reasonable time that he had sold Douglass

the timber and that he (Douglass) had failed to pay for it, to the end that the appellee might secure himself against loss.

It is often a question of very great difficulty to determine whether a particular instrument of writing constitutes a strict guaranty, or whether it constitutes an original undertaking. In a strict guaranty the guarantor does not undertake to do the thing which his principal is bound to do, but his obligation is that the principal shall perform such act as he is bound to perform, or, in the event he fails, that the guarantor will pay such damages as may result from such failure. It is this feature which enables us to distinguish a strict or collateral guaranty from a direct undertaking or promise so that when an instrument of writing resolves itself into a promise or undertaking on the part of the person executing it to do a particular thing which another is bound to do, in the event such other person does not perform the act himself, it is said to be an original undertaking, and not a strict or collateral guaranty. In the latter class of contracts the undertaking is in the nature of a surety, and the person bound by it must take notice of the default of his principal. Manufacturing Co. v. Black, 111 Ind. 308, 12 N. E. Rep. 504; Wright v. Griffith, *ante* 281 (at this term); Ward v. Wilson, 100 Ind. 52; La Rose v. Bank, 102 Ind. 332, I. N. E. Rep. 805; Reigart v. White, 52 Pa. St. 438; Woods v. Sherman, 71 Pa. St. 100; Riddle v. Thompson, 104 Pa. St. 330.

The undertaking of the appellee in this case is not a strict or collateral guaranty but is a direct, absolute, and original promise to pay the appellee for any white or burr oak timber he might sell to Stephen A. Douglass. Frash v. Polk, 67 Ind. 55; Kline v. Raymond, 70 Ind. 271; Burnham v. Gallentine, 11 Ind. 295; Kirby v. Studebaker, 15 Ind. 45; Watson v. Beabout, 18 Ind. 281; Ward v. Wilson, 100 Ind. 52. By delivering such instrument to Douglass, the appellee made him his agent to deliver it to the appellant. In such cases its acceptance, and performance of the conditions upon which it rests, are all that is necessary to make the contract complete and enforceable. Davis v. Wells, 104 U. S. 159; Wills v. Ross, 77 Ind. 1; Kline v. Raymond, 70 Ind. 271; Cooke v. Orne, 37 Ill. 186. This contract not being a collateral guaranty but an original undertaking in the nature of a surety, in which appellee bound himself to pay for the timber, he was not entitled to notice, either of its accept-

ance, or of the failure of Douglass to pay. If he had desired such notice, he should have stipulated for it in his contract. Smith v. Dann, 6 Hill, 543.

It follows from what we have said that the court erred in overruling the demurrer to the answer of the appellee. Judgment reversed, with instructions to the circuit court to sustain the demurrer to the appellee's answer, and for further proceedings not inconsistent with this opinion.

DAVIS v. WELLS. 1881.

104 U. S. 159; 26 Law. Ed. 686.

Error to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

Mr. Justice MATTHEWS delivered the opinion of the court.

The action below was brought by Wells, Fargo & Co., against the plaintiffs in error, upon a guaranty, in the following words:

"For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co. unconditionally at all times, any indebtedness of Gordon & Co. a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars ($10,000) for any overdrafts now made, or that may hereafter be made at the bank of said Wells, Fargo & Co.

"This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing.

"Dated, Salt Lake City, 11th November, 1874.

"In witness whereof we have hereunto set our hands and seals the day and year above written.

"ERWIN DAVIS. (SEAL.)
"J. N. H. PATRICK. (SEAL.)

"Witness: J. GORDON."

The answer set up, by way of defence, that there was no notice to the defendants from the plaintiffs of their acceptance of the guaranty, and their intention to act under it; and no notice after the account was closed, of the amount due thereon; and no notice of the demand of payment upon Gordon & Co.,

and of their failure to pay within a reasonable time thereafter. But there was no allegation that by reason thereof any loss or damage had accrued to the defendants.

On the trial it was in evidence, that this guaranty was executed by the defendants below, and delivered to Gordon on the day of its date, for delivery by him to Wells, Fargo & Co., which took place on the same day; that Gordon & Co. were then indebted to the plaintiffs below for a balance of over $9,000 on their bank account; that their account continued to be overdrawn, Wells, Fargo & Co. permitting it on the faith of the guaranty, from that time till July 31, 1875, when it was closed, with a debit balance of $6,200; that the account was stated and payment demanded at that time of Gordon & Co., who failed to make payment; that a formal notice of the amount due and demand of payment was made by Wells, Fargo & Co., of the defendants below, on May 26, 1876, the day before the action was brought. There was no evidence of any other notice having been given in reference to it; either that Wells, Fargo & Co. accepted it and intended to rely upon it, or of the amount of the balance due at or after the account was closed, and no evidence was offered of any loss or damage to the defendants by reason thereof, or in consequence of the delay in giving the final notice of Gordon & Co.'s default.

The defendants' counsel requested the court, among others not necessary to refer to, to give to the jury the following instructions, numbered first, second, third and fifth:—

1. If the jury believes from the evidence that the guaranty sued upon was delivered by the defendants to Joseph Gordon, and not to the plaintiff, but was afterwards delivered to the latter by Joseph Gordon, or by Gordon & Co., it became and was the duty of Wells, Fargo & Co. thereupon to notify the defendants of the acceptance of said guaranty, and their intention to make advancements on the faith of it; and, if they neglected or failed so to do, the defendants are not liable on the guaranty, and your verdict must be for the defendants.

2. If Wells, Fargo & Co. made any advancements to Gordon & Co. on overdrafts on the faith of said guaranty, it became and was the duty of plaintiff to notify the defendants, within a reasonable time after the last of said advancements of the amount advanced under the guaranty, and if the plaintiff failed

or neglected so to do, it cannot recover under the guaranty, and your verdict must be for the defendants.

3. What is a reasonable time in which notice should be given is a question of law for the court. Whether notice was given is one of fact for the jury. The court, therefore, instructs you that if notice of the advancements made under said guaranty was not given until after the lapse of twelve months or upward from the time the last advancement was made to Gordon & Co., this was not in contemplation of law a reasonable notice, and your verdict, if you so find the fact to be, should be for the defendants.

5. Before any right of action accrued in favor of plaintiff under said guaranty it was incumbent on it to demand payment of the principal debtor, Gordon & Co., and on their refusal to pay, to notify the defendants. If the jury, therefore, find that no such demand was made and no notice given to the defendants the plaintiff cannot recover upon the guaranty.

The court refused to give each of these instructions, and the defendants excepted.

The following instructions were given by the court to the jury, to the giving of each of which the defendants excepted:

1. You are instructed that the written guaranty offered in evidence in this case is an unconditional guaranty by defendants, of any and all overdrafts, not exceeding in amount $10,000, for which said Gordon & Co. were indebted to the plaintiff at the date of the commencement of this suit. If the jury believe from the evidence that said guaranty was by said defendants, or by any one authorized by them to deliver the same, actually delivered to plaintiff, and that plaintiff accepted and acted on the same, such delivery, acceptance, and action thereon by plaintiff bind the defendants and render the defendants responsible in the action for all overdrafts upon plaintiff made by Gordon & Co. at the date of said delivery of said guaranty, and since, and which were unpaid at the date of the commencement of this suit, not exceeding $10,000.

2. The jury are instructed that the written document under seal, offered in evidence in this case, implies a consideration, and constitutes an unconditional guaranty of whatever overdraft, if any, not exceeding $10,000, which the jury may find from the evidence that Gordon & Co. actually owed the plaintiff at the date of the bringing of this suit; and, further, if you

believe from the evidence that an account was stated of such overdraft between plaintiff and J. Gordon & Co., then the plaintiff is entitled to interest on the amount found due at such statement, from the date thereof, at the rate of ten per cent per annum.

These exceptions form the basis of the assignment of errors.

The charge of the court first assigned for error, and its refusal to charge upon the point as requested by the plaintiffs in error, raise the question whether the guaranty becomes operative if the guarantor be not, within a reasonable time, informed by the guarantee of his acceptance of it and intention to act under it.

It is claimed in argument that this has been settled in the negative by a series of well-considered judgments of this court.

It becomes necessary to inquire precisely what has been thus settled and what rule of decision is applicable to the facts of the present case.

In Adams v. Jones (12 Pet. 207, 213), Mr. Justice STORY, delivering the opinion of the court, said: "And the question which under this view, is presented, is whether, upon a letter of guaranty addressed to a particular person or to persons generally for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it. We are all of the opinion that it is necessary; and this is not now an open question in this court, after the decisions which have been made in Russell v. Clarke, 7 Cranch, 69; Edmonston v. Drake, 5 Peters' Rep. 624; Douglass v. Reynolds 7, Peters' Rep. 113; Lee v. Dick, 10 Peters, 482; and again recognized at the present term in the case of Reynolds v. Douglass. It is in itself a reasonable rule enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from further responsibility. The reason applies with still greater force to cases of a general letter of guaranty; for it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached; and to what period it might be protracted. Transactions between the other

parties to a great extent might from time to time exist, in which credits might be given and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the questions were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

In Reynolds v. Douglass (12 Pet. 497, 504), decided at the same term and referred to in the foregoing extract, Mr. Justice McLean stated the rule to be "that, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them to the defendants, that the same had been accepted"; and he added: "This notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference."

There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it in order to constitute a binding promise, in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it as a condition of the promise of the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. This appears very plainly not only from a particular consideration of the cases themselves, but was formerly declared to be so by Mr. Justice Nelson, speaking for the court in delivering its opinion in Louisville Manufacturing Co. v. Welch (10 How. 461, 475), where he uses this language: "He (the guarantor) has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; it is deemed

essential to an inception of the contract; he is, therefore, advised of his accruing liabilities upon the guaranty and may very well anticipate or be charged with notice of an amount of indebtedness to the extent of the credit pledged."

And in Wildes v. Savage (1 Story 22) Mr. Justice STORY, who had delivered the opinion in Douglass v. Reynolds (7 Pet. 113), after stating the rule requiring notice by the guarantee of his acceptance, said: "This doctrine, however, is inapplicable to the circumstances of the present case for the agreement to accept was contemporaneous with the guaranty, and indeed, constituted the consideration and basis thereof."

The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between them. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or a proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete, and may be withdrawn by the proposer. Frequently the only consideration contemplated is that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for as Professor Langdell has pointed out in his Summary of the Law of Contracts (Langdell's Cases on Contracts, 987), "though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the

question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration."

If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract. The same result follows, as declared in Wildes v. Savage (*supra*), where the agreement to accept is contemporaneous with the guaranty, and constitutes its consideration and basis. It must be so wherever there is a valuable consideration, other than the expected advances to be made to the principal debtor, which, at the time the undertaking is given, passes from the guarantee to the guarantor and equally so where the instrument is in the form of a bilateral contract, in which the guarantee binds himself to make the contemplated advances, or which otherwise creates, by its recitals, a privity between the guarantee and guarantor; for in each of these cases the mutual assent of the parties to the obligation is either expressed or necessarily implied.

The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief: "For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is that until it is accepted, and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guarantee the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever."

It is thence argued that the words in the instrument which is the foundation of the present action—"we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times," etc.—cannot have the effect of waiving the notice of acceptance, because they can have no effect at all except as the words of a contract, and there can be no contract without notice of acceptance. And on the supposition that the terms of the instrument constitute a mere offer to guarantee the debt of Gordon & Co., we accept the conclusion as entirely just.

But we are unable to agree to that supposition. We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words, "for and in consideration of one dollar to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we hereby guarantee," etc. How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledge.

It is not material that the expressed consideration is nominal. That point was made, as to a guarantee, substantially the same as this, in the case of Lawrence v. McCalmont (2 How. 426, 452), and was overruled. Mr. Justice STORY said: "The guarantor acknowledged the receipt of the one dollar, and is now estopped to deny it. If she has not received it, she would now be entitled to recover it. A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract; and this is equally true as to contracts of guaranty as to other contracts. A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid. The very point arose in Dutchman v. Tooth (5 Bingham's New Cases, 577), where the guarantor gave a guaranty for the payment of the proceeds of the goods the guarantee had consigned to

his brother, and also all future shipments the guarantee might make in consideration of two shillings and sixpence paid him, the guarantor. And the court held the guaranty good, and the consideration sufficient."

It is worthy of note that in the case from which this extract is taken the guaranty was substantially the same as that in the present case, and that no question was made as to a notice of acceptance. It seems to have been treated as a complete contract by force of its terms.

It does not affect the conclusion, based on these views, that the present guaranty was for future advances as well as an existing debt. It cannot, therefore, be treated as if it were an engagement, in which the only consideration was the future credit solicited and expected. The recital of the consideration paid by the guarantee to the guarantor shows a completed contract, based upon the mutual assent of the parties; and if it is a contract at all, it is one for all the purposes expressed in it. It is an entirety, and cannot be separated into distinct parts. The covenant is single, and cannot be subjected in its interpretation to the operation of two diverse rules.

Of course the instrument takes effect only upon delivery. But in this case no question was or could be made upon that. It was admitted that it was delivered to Gordon for delivery to the plaintiffs below, and that he delivered it to them.

But if we should consider that, notwithstanding the completeness of the contract as such, the guaranty of future advances was subject to a condition implied by law that notice should be given to the guarantor that the guarantee either would or had acted upon the faith of it, we are led to inquire what effect is to be given to the use of the words which declare that the guarantors thereby "guarantee unto them, the said Wells, Fargo & Co., unconditionally, at all times, any indebtedness of Gordon & Co., etc., to the extent and not exceeding the sum of ten thousand dollars for any overdrafts now made, or that hereafter may be made, at the bank of said Wells, Fargo & Co."

Upon the supposition now made, the notice alleged to be necessary arises from the nature of such a guaranty. It is not and cannot be claimed that such a condition is so essential to the obligation that it cannot be waived. We do not see,

therefore, what less effect can be ascribed to the words quoted than that all conditions that otherwise would qualify the obligations are by agreement expunged from it and made void. The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious, and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co. might securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court, that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally, to promote the use and convenience of commercial intercourse.

This view applies with equal force to the exceptions to the other charges and refusals to charge of the court below. These exceptions are based on the propositions,—

1. That if Wells, Fargo & Co. neglected to notify the defendants below of the amount of the overdraft within a reasonable time after closing the account of Gordon & Co.; and,

2. That if they failed within a reasonable time after demand of payment made upon Gordon & Co., to notify the defendants of the default, the plaintiffs could not recover upon the guaranty.

For if the necessity in either or both of these contingencies existed to give the notice specified, it was because the duty to do so was, by construction of law, made conditions of the contract.

But by its terms, as we have shown, the contract was made absolute, and all conditions were waived.

It is undoubtedly true, that if the guarantee fails to give reasonable notice to the guarantor of the default of the principal debtor, and loss or damage thereby ensues to the guarantor, to that extent the latter is discharged; but both the laches of the plaintiff and the loss of the defendant must concur to constitute a defence.

If any intermediate notice, at the expiration of the credit, of the extent of the liability incurred is requisite, the same rule applies. Such was the express decision in Louisville Manufacturing Co. v. Welch, *supra.* An unreasonable delay in giving notice, or a failure to give it altogether, is not of itself a bar.

There was a question made at the trial as to the meaning of the word "overdrafts," as used in the guaranty. It was contended that it would not include the debit balance of account charged to Gordon & Murray, and assumed by Gordon & Co., as their successors, before the guaranty was made, nor charges of interest accrued upon the balance of Gordon & Co.'s account, which was entered to the debit of the account. The reason alleged was, that no formal checks were given for these amounts. The point was not urged in argument at the bar, and was very properly abandoned.

The charges were legitimate and correct, and the balance of the account to the debit of Gordon & Co. was the overdraft for which they were liable. There could be no doubt that it was embraced in the guaranty.

We find no error in the record.

Judgment affirmed.

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b. A mere proposition to guarantee or an offer to guarantee a debt yet to be contracted and uncertain in amount, requires notice of its acceptance to render it binding.

TAUSIG v. REID. 1893.

145 Ill. 488; 32 N. E. Rep. 918.

On rehearing.

PER CURIAM. Upon the filing of the foregoing opinion, judgment was entered reversing and remanding the cause for a new trial. Upon petition for rehearing points were made to which our attention had not been directed, and we have again considered the case. Counsel for appellees, conceding the correctness of the views expressed, insist that a reversal should not be had because of the error in giving said instruction, for the reason that at the time Mrs. Zuckerman became insolvent

(November 24, 1887) there was more than $1,500 of the indebtedness to plaintiffs not due, and in respect of which there had been no default of payment, and, the rule being that in case of insolvency, notice of non-payment, in such case, being without avail, is not required to be given, the guarantors were not released in respect of such indebtedness from liability. It is conceded that over $1,500 of the indebtedness from Mrs. Zuckerman to plaintiffs had not matured at the date she bacame insolvent. It is therefore said that if the instruction is erroneous, as applied to the facts of this case, it was not prejudicial error; and it would follow from the principles before announced, if the amount of $1,500 was due when this suit was brought, which was not due on the 24th of November, 1887, notice of non-payment thereof would have been unavailing to the guarantor.

It is insisted, however, that, although there was over $1,500 not due from Mrs. Zuckerman when she became insolvent, the guarantors were discharged from liability, because after the execution of the guaranty she made default in payments in excess of $1,500, of which no notice was given to the guarantors. It is shown that, commencing in February, 1887, considerable balances remained unpaid, and on the 18th of April, 1887, she was in default in payment of over $1,800; and that a note or notes was taken in settlement of the amount then due; that subsequently to that date she was in default of various sums, aggregating, October 24, 1887, something over $1,100. As this cause must be again submitted for trial, we have deemed it proper to notice this instance. The position of appellants is untenable. They guaranteed the prompt payment at maturity of any indebtedness owing by Mrs. Zuckerman to the plaintiffs for goods purchased, or thereafter to be purchased, of them, to the amount of $1,500. This amount stated in the guaranty, was a limitation upon the liability of the guarantors, and not a limitation upon the credit to be extended to Mrs. Zuckerman. It was, as we have seen, a continuing guaranty, and plainly contemplated that payments made or indebtedness otherwise settled by Mrs. Zuckerman should not in any wise affect their liability for indebtedness incurred by her for goods purchased, and not paid for at maturity. The contract of guaranty looked to a future course of dealing for an in-

definite time; that is, a succession of credits was to be extended, and the guarantors undertook to be liable to the extent of $1,500 for any indebtedness contracted in the course of such dealings, and not paid by Mrs. Zuckerman at maturity. Without extending this opinion by citation from the authorities it will be found that the position taken is supported by Bent v. Hartshorn, 1 Metc. (Mass.) 24; Douglass v. Reynolds, 7 Pet. 113; Hatch v. Hobbs, 12 Gray, 447; Gates v. McKee, 13 N. Y. 232; Rindge v. Judson, 24 N. Y. 64; Grant v. Ridsdale, 2 Har. & J. 186; Mason v. Pritchard, 12 East, 227; Rapely v. Bailey, 5 Conn. 149; Hargreave v. Smee, 6 Bing. 244; Martin v. Wright, 6 Adol. & E. (N. S.) 917; Crittenden v. Fiske, 46 Mich. 70, 8 N. W. Rep. 714, and other cases. It cannot be said that the cases are entirely harmonious as to the principles which govern in the construction of this class of instruments; but the weight of authority seems to be in favor of construing them by rules at least as favorable to the creditor as those applied to other written contracts, notwithstanding the guarantor is, in a sense, to be regarded as a surety. In Mason v. Pritchard, *supra*, it is held that the words are to be taken as strongly against the party giving the guaranty as the sense of them will admit. The same general principle is held more or less directly in Drummond v. Prestman, 12 Wheat. 515; Douglass v. Reynolds, *supra;* Lawrence v. McCalmont, 2 How. 426; Bell v. Bruen, 1 How. 69; Dobbin v. Bradley, 17 Wend. 422; Mayer v. Isaac, 6 Mees. & W. 605.

Taking the language of this instrument, and construing it in the light of the circumstances surrounding it, it seems clear that it was intended that Mrs. Zuckerman should have credit with the plaintiffs, and that appellants would be liable for any balance that might remain unpaid at maturity at any time during the continuance of the guaranty; that is, that it was intended to give her credit with the plaintiffs to the amount of $1,500, until the guaranty should be revoked. We are of opinion that the previous condition of her account with the plaintiffs in no wise affected the liability of the guarantors for any sum owing by Mrs. Zuckerman from which they had not been discharged by the failure of the plaintiffs to give notice, within a reasonable time, of non-

payment. It will, however, be observed that the contract of the guarantors is that Mrs. Zuckerman would pay promptly "at maturity" any indebtedness, etc. Counsel for appellees show conclusively that at least $578.18 of the indebtedness of Mrs. Zuckerman was not due until after the 15th day of December, 1887. After giving the items of sales of goods by plaintiff to Mrs. Zuckerman from the 15th to the 23d of November, counsel say: "The earliest of these sales was made on November 15th, and therefore the credit on the same did not expire until December 15th, and those following became due at a corresponding later period." It is conceded, and is shown by the record, the amount sold on each day was treated as a separate transaction, and the indebtedness for the day's sales would mature at the end of the credit given; that is, the credit being 30 days, the indebtedness contracted on the 15th of November would become due December 15th, and that contracted on subsequent days at corresponding dates in December. The same is true of the goods purchased on the 9th, 10th, 11th, 12th, and 14th days of November, as shown by the record, and amounting in the aggregate to several hundred dollars. It is apparent, therefore, that on December 9, 1887, these several amounts had not matured, and the liability of appellants for their prompt payment at maturity had not attached. Counsel for appellees are correct in their contention that the record shows that these goods were mainly, at least, sold upon 30 days' time; and there is nothing shown by which the credit could, at the option of the plaintiffs, be shortened. This suit was brought December 9, 1887, and it is clear that the liability of the guarantors in respect of such sales had not attached. If suit had been brought against Mrs. Zuckerman at that time, a complete defense as to these items of indebtedness would have existed, because they had not matured at the time the suit was brought. The indebtedness not having matured, there was no liability upon the guaranty therefor. A casual examination of the accounts will show that if reasonable time of giving notice of nonpayment be allowed, and for this purpose the accounts maturing on and before the 18th of November only be excluded because of failure to give notice of nonpayment, it will be found that much less than $1,500 of the indebtedness of Mrs. Zuckerman to the plaintiffs had

matured on the 9th of December, 1887. It cannot be presumed that there was included in the judgment, which was for the full amount of the guaranty, indebtedness not matured; and it is therefore clear that the instruction complained of must have led the jury into the error of taking into consideration, in determining the amount for which appellants were liable, the indebtedness of Mrs. Zuckerman that had matured before the 18th of November, and in respect of which appellants' liability as guarantors had been discharged. What will be reasonable time in which to give notice must depend upon the circumstances in each particular case (Dickerson v. Derrickson, 39 Ill. 574; 2 Pars. Cont. 174); and while it is not necessary to determine the question, it would seem from the facts here shown that five days' time would at least be reasonable within which to give notice of nonpayment. Other errors are assigned, which will undoubtedly be corrected upon another trial, and need not be considered. We are of opinion that the judgment heretofore entered reversing the judgments of the appellate and circuit courts, and remanding the cause, was correct, and the same judgment will be again entered.

Reversed and remanded.

DOUGLAS v. REYNOLDS. (1833.)

7 Peters 113.

The case is stated in the opinion of the court.

STORY, J., delivered the opinion of the court.

This case comes before us upon a writ of error to a judgment of the district court of the district of Mississippi, in which the plaintiffs in error are defendants in the court below.

The original action is founded upon a guarantee, given by Douglas and others in favor of one Chester Haring, by the following letter:

"PORT GIBSON, December, 1807.

"Messrs. Reynolds, Byrne and Co.

"Gentlemen: Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm by so doing, we do hereby bind

ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding $8,000, should the said Chester Haring fail to do so.

"Your obedient servants,
"JAMES S. DOUGLAS.
"THOMAS G. SINGLETON.
"THOMAS GOING."

The declaration contains two counts. The first alleges that, upon the faith of the letter, the original plaintiffs accepted and indorsed drafts or paper of Haring to the amount of $8,000, which they were obliged to pay, and did pay at the maturity thereof; and of which they gave due notice to the defendants. The second count is for money lent, and money had and received. But this may be laid entirely out of the case, since it is very clear that, upon a collateral undertaking of this sort, no such suit is maintainable.

At the trial upon the general issue and the plea of payment, the plaintiffs, who are resident merchants at New Orleans, offered evidence to prove the payment of five promissory notes, dated on the 1st of May, 1829, payable to Daniel Greenleaf or order, and indorsed by him, namely: one note due on the 20th of November, 1829, for $4,000; one due on the 20th of December, 1829, for $4,500; one due on the 20th of January, 1830, for $5,500; one due on the 20th of February, 1830, for $5,500; and one due on the 20th of March, 1830, for $5,500, in the whole amounting to $25,000; and that the notes had been discounted with the plaintiffs' indorsement thereon, and were taken up by them at maturity.

It also appeared in evidence that soon after the letter of guarantee had been received, acceptance had been made of the drafts of Haring by the plaintiffs to the amount of $8,000; and that other large transactions of debt and credit took place between them, upon which, on the 1st of May, 1829, there was a balance of principal of $22,573.23, besides interest, due to the plaintiffs, and credits to a larger amount than $8,000 had come into possession of the plaintiffs. And on that day the foregoing notes were received, and the following receipt written on the account containing the balance:

"Received, Port Gibson, May 1, 1829, in part and on account of the above account, and interest that may be due thereon, the

following notes, to-wit (enumerating them), amounting in all to $25,000, which notes, when discounted, the proceeds to go to the credit of this account.

"REYNOLDS, BYRNE AND CO."

There was a good deal of other evidence in the cause, but it does not seem necessary to state it at large, since no part of it becomes important to a just understanding of the merits of the controversy, as it now stands before us.

In the progress of the trial, the depositions of several witnesses who were clerks in the counting-house of the plaintiffs were read, in which they stated that they knew that the letter of credit was considered by the plaintiffs as covering any balance due by Chester Haring to the plaintiffs, for advances from that time to the extent of $8,000; and that advances were made, and moneys paid by them on account of Haring from the time of receiving the said letter of credit, predicated on the said letter always protecting the plaintiffs to the amount of $8,000, whenever the said amount or less might be uncovered, and that it was considered in the said counting-house of the plaintiffs as a continuing letter of credit, and so acted upon by the plaintiffs. To the admission of this part of the depositions the defendants objected; but the court overruled the objection, and permitted the evidence to be read to the jury as evidence of the reliance of the plaintiff upon the letter of credit to the amount of the $8,000, for acceptance, payments, advances, and indorsements made to Haring. The defendants excepted to this admission of the evidence, and the propriety of this ruling of the court constitutes the first question in the case.

We are of opinion that the evidence was rightly admitted in the view and for the purposes stated by the court below. It was not offered to explain or establish the construction of the letter of credit. See Russell v. Clarke, 3 Dall. 415, s. c. 7 Cranch, 69, whether it constituted a limited or a continuing guarantee; and was not thus open to the objection which has been relied on at the bar, that it was an attempt by parol evidence to explain a written contract. It was admitted simply to establish that credit had been given to Haring upon the faith of it from time to time, and that it was treated by the plaintiffs as a continuing guarantee; so that if, in point of law, it was entitled to that character, the plaintiffs' claim might not be

open to the suggestion that no such advances, acceptances, or indorsements had in fact been made upon the credit of it; an objection which, if founded in fact, might have been fatal to their claim. Nothing can be clearer upon principle, than that if a letter of credit is given, but in fact no advances are made upon the faith of it, the party is not entitled to recover for any debts due to him from the debtor, in whose favor it was given, which have been incurred subsequently to the guarantee, and without any reference to it.

The other exceptions are to certain instructions prayed by the defendants, and refused by the court.

They are as follows:

1. That the said letter of credit sued on is not a continuing guarantee, but is a limited one; and that when an advance or advances, acceptance or acceptances, indorsement or indorsements, had been made by the plaintiffs on the faith of said letter of credit to the amount of $8,000, the guarantee became *functus officio,* and ceased to operate upon any future advances, acceptances, or indorsements, made by said plaintiffs for Chester Haring. And that if the said plaintiffs received from said Haring, in payment of their advances, acceptances, or indorsements, made on account of said guarantee, the amount of $8,000, it was a discharge of said letter of guarantee; and that any future advances, acceptances, or indorsements, cannot be charged against and recovered from the defendants, by virtue of said letter of credit.

2. That to entitle the plaintiffs to recover on said letter of guarantee, they must prove that notice had been given in a reasonable time after said letter of guarantee had been accepted by them, to the defendants that the same had been accepted.

3. That to entitle the plaintiffs to recover on said letter of credit, they must prove that, in a reasonable time after they had made advances, acceptances, or indorsements, for said Haring, on the faith of said letters of guarantee, they gave notice to said defendants of the amount and extent thereof.

4. That to entitle the plaintiffs to recover on said letter of credit, they must prove that a demand of payment had been made of Chester Haring, the principal debtor, of the debt sued for; and in case of non-payment by him, that notice of such demand and non-payment should have been given in a reason-

able time to the defendants; and in failure of such proof, the defendants are in law discharged.

5. That the promissory notes, drawn by C. Haring, the principal debtor, and indorsed by Daniel Greenleaf, and received by the plaintiffs on the 1st of May, 1829, as expressed in the said receipt of that date at the end of their said account, and the discounting the same in New Orleans by the plaintiffs after they had indorsed the same for that purpose; the same being discounted before they fell due, and the receipt of the net proceeds arising from the discounting, carried to the credit of Chester Haring's account on the books of the plaintiffs, was a discharge of the guarantors on said guarantee, provided the debt now sued for was included in the sum total of said account, on account of which said promissory notes were taken and receipted for.

6. That if the said notes, mentioned in said receipt, were received as conditional payments of said debt, the defendants are discharged, unless it be proved that due diligence has been used to recover the amount called for by said notes from the individuals responsible thereon, and that the same could not be obtained.

7. That the plaintiffs, by accepting said notes on account of said debt, from C. Haring, the principal debtor, with D. Greenleaf as indorser, on account of said debt, the same being at that time due, and receiving the money on the same by discounting them, and the passing said notes away by indorsement, could not have sued Haring for the original debt, before said notes fell due, dishonored, and returned to the plaintiffs; and that, therefore, they by their own act placed in out of their power to proceed against said Haring, to recover said debt, before said notes fell due and were returned to the plaintiffs, which, in law, discharge the guarantors.

There was another exception, but it was withdrawn from the cause by the defendants; and that, as well as another respecting the refusal of the court to sign the bill of exceptions, without incorporating in it the evidence given at the trial, may be dismissed without commentary. It is proper to add, however, that the conduct of the court in relation to the bill of exceptions constitutes no just matter of error revisable in this form of proceeding; and if it did, we see no reason to question the pro-

priety of its conduct upon the present occasion. It is manifestly proper for the court to require that all the evidence which is explanatory of the true points of the exceptions should be brought before the appellate court, to assist it in forming a correct judgment.

The question involved in the first instruction is, whether the guarantee contained in the letter is a limited or a continuing guarantee; or, in other words, whether it covered advances, acceptances, and indorsements, in the first instance, to the amount of $8,000, and terminated when these were discharged; or whether it covered successive advances, acceptances, and indorsements made to the same amount at any future times, *toties quoties*, whenever the antecedent transactions were discharged. Upon deliberate consideration, we are of opinion that it is a continuing guarantee; and we found ourselves upon the language, and the apparent intent and object of the letter. Every instrument of this sort ought to receive a fair and reasonable interpretation, according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms. It was observed by the court in Russell v. Clarke's Executors, 7 Cranch, 69, that "the law will subject a man, having no interest in the transaction, to pay the debt of another only when his undertaking manifests a clear intention to bind himself for that debt. Words of doubtful import ought not, it is conceived, to receive that construction." On the other hand, as these instruments are of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement; and for this purpose it was recognized by this court in Drummond v. Prestman, 12 Wheat. 515, as a rule in expounding them, that the words of the guarantee are to be taken as strongly against the guarantor as the sense will admit; Fell on Guarantee, c. 5, p. 128, etc.; and the same rule was adopted in the king's bench in Mason v. Pritchard, 12 East, 227.

If we examine the language or object of the present letter, we think it is difficult to escape from the conclusion that it was intended and was understood by all the parties as a continuing guarantee. There is no doubt that it was so interpreted by the

plaintiffs. The object is to assist Haring in business; "our friend Mr. Chester Haring," to assist him "in business may require your aid." It was not contemplated to be a single transaction, or an unbroken series of transactions for a limited period. The aid required was to be "from time to time, either by acceptance or indorsement of his paper, or advances in cash." The very nature of such negotiations, with reference to the business of the party, unless other controlling words accompanied them, would seem to indicate a succession of acts at different periods, having no definite termination or necessary connection with each other. The language of the letter then proceeds: "In order to save you from harm in so doing, we do hereby bind ourselves, etc., to be responsible to you at any time for a sum not exceeding $8,000, should the said Chester Haring fail so to do." It is difficult to satisfy this language without giving to the guarantee a continuing operation. The parties agree to be responsible, at any time, for a sum not exceeding $8,000; and if so, is not the natural, nay necessary import, that the acceptances, indorsements, and advances are not limited in duration; but that whenever made, and at whatever future times, the same responsibility shall attach upon them, not exceeding $8,000? We think that it would be difficult to give any other interpretation of the language, without subjecting mercantile papers to refinements and subtleties which would betray innocent men into the most severe losses by an unsuspecting confidence in them. That the language fairly admits of, if it does not absolutely require this construction, cannot be doubted. If it does so, it is but common justice that it should receive this construction in favor of innocent parties who have made acceptances, indorsements, and advances upon the faith of it, according to the rule already stated, that the words shall be taken as strongly against the party using them as the sense will admit.

It is rare that in cases of guarantee the language of the instruments is such as to make the decision upon one an exact authority for that of another. The whole words and clauses are to be construed together, and that sense is to be given to each which best comports with the general scope and intent of the whole. So far as authorities go, however, we think they are decidedly in favor of the interpretation which we have

adopted. In Mason v. Pritchard, 12 East, 227, s. c. 2 Camp. 436, the words of the guarantee were, "to be responsible for any goods he hath or may supply my brother with to the amount of £100." And the court were of opinion that it was a continuing or standing guarantee to the extent of £100, which might at any time become due for goods supplied until the credit was recalled. That case was certainly founded upon words less expressive and cogent than those of the case before us. In Merle v. Wells, 2 Camp. 413, the guarantee was: "I consider myself bound to you for any debt he (my brother) may contract for his business as a jeweler, not exceeding £100, after this date." Lord Ellenborough held it a continuing guarantee for any debt not exceeding £100, which the brother might from time to time contract with the plaintiffs in the way of his business; and that the guarantee was not confined to one instance, but applied to debts successively renewed. The case of Sansom v. Bell, 2 Camp. 39, before the same learned judge, is to the same effect. The case of Bastow v. Bennet, 3 Camp. 220, was upon words far less stringent. There the guarantee was: "I hereby undertake and engage to be answerable to the extent of £300 for any tallow or soap supplied by B. to F. and B., provided they shall neglect to pay in due time." Lord Ellenborough held it a continuing guarantee, principally upon the force of the word any; but the case went off upon another point.

The cases cited on the other side are all distinguishable. Kirby v. The Duke of Marlborough, 2 Maule & Selw. 18, turned upon the ground that the whole recital of the bond showed that a limited guarantee, for advances to a definite amount, when they were made the guarantee, became *functus officio*. In Melville v. Hayden, 3 Barn. & Ald. 593, the guarantee was: "I engage to guarantee the payment of A. to the extent of £60 at quarterly account, bill two months, for goods to be purchased by him of B.," and the court held, that it was not a continuing guarantee, as the words "quarterly account" import only the first quarterly account; and relied on the word "any" in Mason v. Pritchard, 12 East, 227, as distinguishing that case from the one before them. The case of Rogers v. Warner, 8 Johns. 119, was on a guarantee in these words: "If A and B, our sons, wish to take goods of you on credit, we are willing to lend our

names as security for any amount they may wish;" and the court held it to be a limited guarantee for a single credit. It is observable, that here no words of continuing credit, such as "from time to time," or "at any time," are used; so that the whole language is satisfied by one transaction. It is, therefore, strongly distinguishable from that before this court.

We cannot admit, therefore, as has been contended at the bar, that the court have inclined to vary the rule of constructions of instruments of this nature, and to hold them to be *strictissimi juris* as to their interpretation. And we are well satisfied that the authorities in no degree interfere with the construction which we have given to the terms of the present letter. The court below were then right in refusing the first instructions.

The second instruction insists, that to entitle the plaintiffs to recover on the guarantee, they must prove that notice had been given to the defendants of that fact in a reasonable time after the guarantee had been accepted. Whether there was not evidence before the jury sufficient to have justified them in drawing the conclusion that there was such a notice, we do not inquire. It is sufficient for us to declare, that in point of law the instruction asked was correct, and ought to have been given. A party giving a letter of guarantee has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct and his exercise of vigilance in regard to the party in whose service it is given. Especially is it important in the case of a continuing guarantee, since it may guide his judgment in recalling or suspending it.

The third instruction insists, that to entitle the plaintiffs to recover on the guarantee, they must prove that in a reasonable time after they made advances, acceptances, or indorsements for Haring on the faith of the guarantee, they gave notice to the defendants of the amount and extent thereof. If this had been the case of a guarantee limited to a single transaction, there is no doubt that it would have been the duty of the plaintiffs to have given notice of the advances, acceptances, or indorsements made to Haring, within a reasonable time after they were made. But this being a continuing guarantee, in which

the parties contemplated a series of transactions, and as soon as the defendants had received notice of the acceptance, they must necessarily have understood that there would be successive advances, acceptances, and indorsements, which would be renewed and discharged from time to time, we cannot perceive any ground of principle or policy upon which to rest the doctrine that notice of each successive transaction, as it arose, should be given. All that could be required would be, that when all the transactions between the plaintiffs and Haring under the guarantee were closed, notice of the amount for which the guarantors were held responsible should, within a reasonable time afterwards, be communicated to them. And if the instruction had asked nothing more than this, we are of opinion, upon principle, as well as upon the authority of Russell v. Clarke's Executors, 7 Cranch, 69, and Edmondston v. Drake, 5 Pet. 624, that it ought to have been given. Oxley v. Young, 2 H. Bl. 613; Peel v. Tatlock, 1 Bos. & Pull. 419. But it goes much further, and requires in the case of a continuing guarantee, that every successive transaction under it should be communicated from time to time. No case has been cited which justifies such a doctrine, and we can perceive no principle of law which requires it. The instruction was, therefore, properly refused.

The fourth instruction insists, that a demand of payment should have been made of Haring, and, in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendants, otherwise the defendants would be discharged from their guarantee. We are of opinion that this instruction ought to have been given. By the very terms of this guarantee, as well as by the general principles of law, the guarantors are only collaterally liable upon the failure of the principal debtor to pay the debt. A demand upon him and a failure on his part to perform his engagements are indispensable to constitute a *casus feoderis.* The creditors are not indeed bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose, but have a right to insist that the risk of their responsibility shall be fixed, and terminated within a reasonable time after the debt

has become due. The case of Allen v. Rightmere, 20 Johns. 365, is distinguishable. There the note was payable to the defendant himself or order, at a future day, and he indorsed it with a special guarantee of its due payment; and the court held his condition absolute and not conditional.

The fifth instruction insists that the promissory notes mentioned in their receipt of the 1st of May, 1829, when discounted, and the proceeds carried to the account of Haring, operated a discharge of the guarantors provided the debt sued for was included in the sum total of the account for which those notes were received. We think that the court were not bound under the circumstances to give this instruction. It proceeds upon the ground, that the notes were necessarily received as an absolute payment, a fact which the court had no right to assume, and that, by indorsing the notes and procuring the same to be discounted and credited in the account, the guarantee was, *per se,* discharged. This is not correct in point of law; for if the plaintiffs, by their indorsements, were compellable to pay, and did afterwards pay the notes upon their dishonor by the maker, and these notes fell within the scope of the guarantee, they might, without question, recover the amount from the guarantors.

The sixth instruction asserts, that if the notes mentioned in the receipt were received as conditional payments of the said debt, the defendants are discharged, unless it is proved that due diligence had been used to recover the amount of them from the individuals responsible thereon, and that the same could not be obtained. If, by the word "recover," were here intended a recovery by a suit at law, the proposition could not be maintained. But if, as we suppose, it is used in the sense of collect or obtain, its correctness as a general proposition in cases of conditional payments of debts by notes, is admitted. He who receives any note upon which third persons are responsible, as a conditional payment of a debt due to himself, is bound to use due diligence to collect it of the parties thereto at maturity, otherwise by his laches the debt will be discharged. The difficulty is in applying the doctrine to the circumstances of the present case in the actual form in which it is propounded in the instruction. It assumes, as matter of fact, what the court cannot intend, that the notes were received as conditional pay-

ment. It does not assert what the debt is to which it alludes; though it probably refers to the debt stated in the account connected with the receipt. Now, that account is not in terms sued for; but certain drafts amounting to $8,000, accepted and indorsed, and paid by the plaintiffs; and whether they were included in the account or not was matter of evidence and not matter of law. Although then the instruction asserted a proposition generally true in point of law, it is not clear that, in the very terms in which it is propounded, with reference to the case in judgment, the court were bound to give it, since it involved matters of fact.

The seventh instruction is open to a similar objection. It manifestly assumes, as its basis, general questions of fact, upon which the court had no right to pronounce judgment. It also supposes that the debt sued for is wholly confined to the account, and that the notes referred to were not within the scope of the guarantee, and, if paid by the plaintiffs, could not be recovered of the defendants; which is far from being admitted. Indeed, this and several of the preceding instructions proceed upon the ground, that the guarantee was a limited and not a continuing guarantee, which construction has been already overturned.

Upon the whole, we are of opinion that the court below erred in refusing the second and fourth instructions prayed by the defendants, and that for these errors the judgment must be reversed, and the cause remanded to the district court of Mississippi with directions to award a venire *facias de novo.*

End.

THOMPSON v. GLOVER. 1879.

78 Ky. 193; 39 Am. Rep. 220.

Action on guaranty. The opinion states the case. The defendant had judgment below.

HINES, J. T. B. Glover of the city of Louisville, Kentucky, having shipped to appellant, in the city of New York, twenty-three hogsheads of tobacco, and desiring to draw on the appellant for their full value, it was agreed between appellant, through

his agents, Lewis & Bro., in the city of Louisville, and appellee, that in consideration that appellant would pay said draft appellee would make good to appellant any loss he might sustain by reason of the tobacco failing to sell for the amount thus to be advanced. At the time of the agreement appellee executed the following paper which was forwarded by Lewis & Bro. to appellant in New York, to wit:

"Louisville, Ky., May 26, 1876.

"Mr. S. E. Thompson, New York:

"Dear Sir:—My brother, T. B. Glover, having this day shipped to you for his account twenty-three hogsheads of tobacco marked (giving numbers), and in view of his drawing for full cost of same, I hereby agree to secure you against any loss that this shipment may make, and in the event of any loss bind myself to pay it.

(Signed) "THOMAS H. GLOVER."

On the same day and at the same time, T. B. Glover drew a one-day sight-draft for $1,943.22, addressed to appellant, New York, and payable to the order of appellee, which was indorsed by appellee, accepted by appellant and paid by him at maturity. The tobacco was sold and failed to realize the amount of the draft by $854.39, of which fact appellee was notified within ten days, and failing to pay, this action was instituted.

The only question presented by the appeal, necessary to be considered, is whether appellee was entitled to notice of acceptance of the guaranty.

It is well established that there must be an acceptance of the offer of guaranty and a notice express or implied to the guarantor of such acceptance. The reason of this rule is, that the guarantor may have an opportunity of arranging his relations with the party for whose benefit or in whose favor the guaranty is given. The rule should not be pressed beyond this reason. When the whole of the transaction is connected and of such a nature as to give the guarantor this information, no specific or formal notice is necessary. In the case under consideration the agreement to accept made with Lewis & Bro. for appellant, was contemporaneous with the guaranty and was the consideration therefor, and all the parties being privy to the whole transaction no specific notice was necessary. Wildes v. Savage, 1 Story 22; Bleeker v. Hyde, 3 McLean 279; Chitty on Cont. 744, note c.; 2 Pars. on Cont. 13; Steadman v. Guthrie, 4 Metc. 153; Fells on Guaranty

523; White v. Reed, 15 Conn. 463; Smith v. Donn, 6 Wend. 543.

The minds of all the parties met and the contract was completed at the time of the execution and delivery to Lewis & Bro. of the writing by appellee, and of the drawing of the draft. The only notice that could have been of any benefit to the appellee and to which he was entitled, was the notice of the amount that the tobacco fell short and the failure of T. B. Glover to pay the same. This notice appellee received within a reasonable time. Bowman v. Curd, 2 Bush. 566.

Judgment is reversed and cause remanded with directions to enter judgment for appellant.

Judgment reversed.

CENTRAL SAVINGS BANK v. SHINE. 1871.

48 Mo. 456; 8 Am. Rep. 112.

Action on a guaranty. The opinion states the case.

WAGNER, J. This cause was tried on a second amended petition, in which the plaintiff states as its cause of action that Peter O'Neill and Francis Doyle were partners under the name of O'Neil & Co., and that, on the 13th of March, 1868, Joseph O'Neil being president of the plaintiff, the defendant wrote to him on that day from Ireland, as follows:

"Hearing from P. O'Neil and Mr. Doyle that they could use advantageously some additional cash over and above the amount already had of your bank, and being desirous to promote their interests and enable them to carry on their business efficiently, I will thank you to submit to your board, that, if they will lend O'Neil & Co. $15,000 I shall hold myself responsible for that amount, and will leave with you, as collateral security, the note and mortgage of Isaac Walker, which is at present in your vault, for a like sum (say $15,000). If the Central cannot conveniently make this advance, I will feel obliged to assist them in procuring it elsewhere."

The petition also states that this paper was delivered to the said president on the 30th day of March, 1868, by him on the same day laid before the board of directors and by them accepted; that, by this writing, defendant promised the plaintiff

that if it would loan to O'Neil & Co. $15,000, he (defendant) would be responsible for that amount; that thereupon, "on the faith thereof, plaintiff lent to O'Neil & Co., in the ordinary and usual manner of such loans, $15,000, of which defendant afterward had due notice; that of this sum $10,000 was lent on the 30th of March, 1868, for sixty days, and the balance on the 9th of April, 1868, for sixty days; of all of which the defendant afterward had full knowledge, and agreed and assented thereto and approved thereof."

The answer admitted the writing set out in the plaintiff's petition, but denied that the plaintiff at any time gave to the defendant notice of the acceptance of the proposal, or that the proposal was accepted; denied, further, that plaintiff made to O'Neil & Doyle any loans or advances on the faith of the writing as stated and set forth, or that he had any notice of them from any source, prior to the commencement of this suit, or that he at any time assented to or approved the same.

To this answer there was a replication, which simply denied that defendant made a proposal in writing to guaranty plaintiff, in case it would make any loan to O'Neil & Doyle, and that the only writing or contract made by the defendant, relating to the loan, was the agreement mentioned in the petition. The cause was tried by the court sitting as a jury, and the verdict and judgment were rendered for the plaintiff.

Whether the loans were made, and in what manner, were questions of fact, and the verdict and finding of the court below in that regard is conclusive here. So far as refusing instructions asked for the defendant is concerned, we see no ground for interference. Those already given at his instance covered the material points in the case and were sufficiently favorable.

The second instruction given for the plaintiff is, I think, unobjectionable. If, after the loan was made, defendant had information thereof, and with full knowledge approved of what the plaintiff had done in the premises and assented thereto, this would amount to a ratification, and he would be bound thereby. But, under the pleading, the main issue presented is as to the real character of the writing addressed by the defendant to the plaintiff. The view of the plaintiff is that it is an original, primary undertaking—an absolute promise, binding the defendant, without any notice of acceptance. On the other hand, the defendant contends that it is nothing more than a guaranty, and

that, to impose any obligation on the defendant, notice of acceptance was indispensably necessary.

The first and third instructions given by the court for the plaintiff proceed upon the theory that the writing was an original promise, and so treat it, and declare that if the plaintiff loaned the sum to O'Neil & Co., in pursuance of the writing, then it was entitled to recover. The instructions wholly dispense with any notice of acceptance to be given to the defendant, and hold the writing to be a binding contract as soon as acted upon by the plaintiff, whether the defendant was ever apprised of that fact or not.

There is a marked difference between an overture or proposition to guaranty and simply a contract of suretyship. The one is a contingent liability, the other is an actual undertaking. The surety is bound with his principal as an original promisor; he is a joint debtor with his principal from the very inception of the agreement, and his obligation continues until full payment is made. An indulgence by the creditor will not absolve him, for his liability is absolute, and he is bound to know of his principal's default. But the contract of a guarantor is his separate, independent contract. It is not a joint engagement with the principal to do a thing. It is in the nature of a warranty that some one else shall do a certain thing or act, and the guarantor is responsible only for the default or failure of his principal. A surety, being a joint contractor, may be sued with his principal; a guarantor cannot be.

The great weight of authorities, including the decisions in this State, establish the proposition that, as the original contract with the principal is not the contract of the guarantor, the creditor is bound to give him notice if he intends to hold him responsible. The counsel for the plaintiff have cited cases to show that no notice is necessary, and that the guarantor is bound whenever the creditor receives his proposition and acts on it; but the law of this State is settled otherwise. That the paper, addressed by the defendant to the plaintiff, was simply an overture or proposition, instead of a direct or absolute undertaking, seems to be sufficiently plain. He says, in substance, that hearing that O'Neil & Co. could use some additional cash, over and above the amount already had of the plaintiff, he would thank the president of the plaintiff to submit to the board if they would lend the firm $15,000, and he would hold him-

self responsible for that amount; but, if the plaintiff could not conveniently make the advance, he should feel obliged to procure it elsewhere. This was nothing but the submission of a proposition. The defendant did not know whether it would be accepted or not, and until he was notified of its acceptance he obviously could not tell anything about the nature or certainty of its liability. This, it appears to me, is the fair and correct interpretation of the instrument; and the decisions in this State and in other courts, which we have followed, have so construed similar writings, and held that notice of acceptance was necessary to fix the responsibility of the guarantor.

In the case of Smith v. Anthony, 5 Mo., 504, Smith addressed to Anthony the following letter:

"Col. Wm. Anthony: Dear Sir—Wm. Mitchell, Jr., will probably call on you to purchase your horse; and, should you conclude to sell, you can do so. Take his note, and I will be responsible for the payment on his return.

Respectfully, ZENAS SMITH."

Anthony sold Mitchell his horse, and Mitchell took him to Alabama, and returned; and, failing to make payment, suit was brought against Smith, and it was held that before Anthony could recover he must prove that he gave Smith notice that he had sold on the faith of the guaranty, and that he looked to him for payment.

In Rankin v. Childs, 9 Mo. 676, McCourtney applied to Rankin to purchase lumber for building a ferry-boat. Rankin refused to credit him without security. McCourtney mentioned the name of Childs as security, and he was accepted as sufficient. A few days after McCourtney presented a bill of the lumber in Childs' handwriting, at the foot of which was written:

"Messrs. Rankin will furnish the above bill as soon as possible, and I will order what more I may want for my boat in a short time. JAMES MCCOURTNEY."

"I hereby guaranty the payment of the above bill. January 29, 1842. WM. CHILDS."

It was in evidence that the lumber was delivered, and that, while the boat was being built, Childs was frequently present as a visitor, but took no part in the matter. In an action

against Childs, it was held that his contract was not a direct promise, but a mere guaranty, and, to hold him liable, notice should have been given of the acceptance of the guaranty.

In Douglass v. Reynolds, 7 Pet. 113, a letter was addressed by the defendant to the plaintiff in the following words:

"Gentlemen—Our friend, Mr. Chester Haring, to assist him in business, may require your aid from time to time, either by acceptance or indorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding $8,000, should the said Chester Haring fail to do so."

It was held this was a guaranty, and that, to hold the guarantors liable, they were entitled to notice of its acceptance.

This is now and has long been the firmly established doctrine in the supreme court of the United States. Reynolds v. Douglass, 12 Pet. 497; Russell v. Clark, 7 Cranch 69; Edmondston v. Drake, 5 Pet. 624; Lee v. Dick, 10 id. 482.

In Maine, the following instrument was construed in the same way:

"Messrs. W. & G. Tuckerman: Gentlemen—For the bill of goods which Mr. Charles B. Prescott bought of you on the 6th inst., I hold myself responsible to you for payment agreeably to the contract made with him; and I will hold myself responsible for any goods which you may sell him, provided the amount does not exceed at any time $500." This was decided to be a guaranty, and as the plaintiff had not given notice of its acceptance in the first instance, nor of the delivery of the goods under it subsequently, he could not succeed in his action. Tuckerman v. French, 7 Me. 115. A similar decision was made in the case of Bradley v. Cary, 8 id. 234.

The question was decided in the same way, on essentially the same state of facts, in Craft v. Isham, 13 Conn. 28; Oakes v. Weller, 13 Vt. 106; S. C., 16 id. 63; Lowry v. Adams, 22 id. 166; Babcock v. Bryant, 12 Pick. 133; Mussey v. Rayner, 22 id. 223. In all these cases the courts hold that notice of acceptance is an essential element, without which a guaranty of future advances cannot rise higher than a mere proposal or offer, nor ascend to the rank of a binding agreement.

Mr. Parsons sums up the rule, as deduced and extracted from the weight of authority, that where there is a guaranty for

future operations, perhaps for one of uncertain amount, and offered by letter, there should then be a distinct notice of acceptance, and also a notice of the amount advanced upon the guaranty itself. 2 Pars. Cont. (5th ed.) 13.

The reason which underlies the principle of notice is that the guarantor may know distinctly his liability, and have the means of arranging his relations with the party in whose favor the guaranty is given, and take from him security or indemnity. While New York and some few of the other States have decided that notice of acceptance is unnecessary to bind the guarantor, still the contrary doctrine is ruled in our own courts and the national courts, and a large majority of the courts of other States.

Messrs. Hare & Wallace, in their edition of Leading Cases, say, that, notwithstanding the objections which may be made to the doctrine which makes notice essential to complete the obligation of prospective and contingent guaranties, it has been transplanted from the courts of the United States into many of the State tribunals, and is now well-settled law in New England, Pennsylvania, Ohio, Missouri, Kentucky, Alabama, and some other parts of the Union. 2 Am. Lead. Cas. (4th ed.) 73.

It was formerly held that notice of an intention to accept and act under the guaranty was an obligation of the commercial rather than the common law, and that it must be given immediately, or, at all events, without unnecessary delay. But the cases of Douglass v. Reynolds, *supra,* and The Louisville Manuf. Co. v. Welch, 10 How. 461, are limited to a declaration that notice must be given within a seasonable or reasonable time after what is called "acceptance." And the latter decision establishes not only that a reasonable notice of what is done under the guaranty will be sufficient, but also that no delay in giving it will be a bar to the action, unless it is productive of some injury to the guarantor.

The better opinion, I am inclined to think, is that a general averment of notice is sufficient; and the question whether it be reasonable, under all the circumstances of the case, is one of evidence which should be left to the jury under proper instructions from the court. Lawrence v. McCalmont, 2 How. 426; Louisville Manuf. Co. v. Welch, *supra;* Williams v. Staton, 5 Sm. & M. 347; Walker v. Forbes, 25 Ala. 139.

For the error of the court in giving the first and third in-

structions for the plaintiff, the judgment must be reversed and the cause remanded. The other judges concur.

Shine having died since the submission of this cause, the clerk will enter up the judgment as of the last term *nunc pro tunc.*

MONTGOMERY v. KELLOGG. 1870.

43 Miss. 486; 5 Am. Rep. 508.

Action on a guaranty. The opinion states the case.

SIMRALL, J. Suit was brought by Kellogg & Sandusky, commercial partners, on the following writing, to-wit:

Prairie Place, 1st June, 1866.

Messrs. Kellogg & Sandusky:

Gentlemen.—Mr. H. C. Coody proposes to purchase some supplies of you, payable out of the first proceeds of his crop. In case you should let him have them, I will see the amount of his account with you paid, as he may agree with you, to the amount of $400, or less, if he should purchase less.

Yours, etc.

ALEX MONTGOMERY.

The several questions made in this court arise out of the rulings of the circuit court, in overruling the defendant's demurrer to the declaration, in the granting and refusing of instructions to the jury, and in denying the motion for a new trial.

1st. It is maintained by the plaintiff in error that he had no notice or no sufficient notice of the acceptance of the letter of credit or guaranty by Kellogg & Sandusky.

2d. No sufficient and timely notice of the default made by H. C. Coody in the payment for the goods taken up by him with Kellogg & Sandusky, and the non-averment or insufficient statement of these facts in the declaration, make it obnoxious to demurrer.

The allegation in the declaration is, "of all which said premises the defendant had due notice, to-wit: on," etc. In Willis v. Staten, 5 S. & M. 353, the averment was "of all which the said defendant afterward had due notice." The suit was upon a letter of credit, for a liability to be incurred on its faith. It was held that the allegation of notice was sufficient.

The important inquiries are: What, if any, notice of the acceptance of the guaranty was the guarantor entitled to? And what notice of the default made by Coody in paying for the goods? And was the law of the case properly laid before the jury in the instructions of the court? In Thrasher v. Ely, 2 S. & M. 147, the doctrine is recognized that if the guaranty is of a specific existing demand, as a promissory note or other evidence of debt, then no notice of default in payment on the part of the principal debtor is required. In such case, the guarantor knows precisely what he undertakes and the measure of his responsibility. The principle seems to be, that if the guaranty is absolute in its terms, definite as to amount and extent, notice is dispensed with.

But if the guaranty be for future advances, credits or payments, it is the duty of the party making the advances to give notice to the guarantor of his acceptance, and of his consent to make the advances on the faith of the guaranty. This is very clearly settled as the rule in the supreme court of the United States. Burrell v. Clarke, 7 Cranch 69; Edmundson v. Drake, 5 Peters, 629; Douglas v. Reynolds, 7 Peters 113; Lee v. Dick, 10 Peters, 482; Adams v. Jones, 12 Peters, 207; Reynolds v. Douglas, 12 Peters, 497.

If the engagement be to make advances on future contingencies, which may or may not happen, in addition to the general notice of acceptance of the guaranty, and a purpose to act on its faith and credit, it may be necessary also to advise the guarantor of the occurrence of the contingencies and the advances made, for otherwise he might not know whether any use were made of the guaranty, and might, because thereof, lose opportunity to obtain indemnity from the principal debtor. Crumer v. Higginson, 1 Mason, 323.

In Douglas v. Reynolds, already cited, it was declared in reference to a continuing guaranty for acceptances, indorsements and credits, that it was but reasonable, when the whole transactions were ended, notice of the amount claimed from the guarantor should be given within a reasonable time afterward.

The purpose of the notice is that the guarantor may at once set about securing himself against loss. When the letter of credit, therefore, is continuing, and indefinite as to amount, the reason is stronger for a prompt notice of a default in the principal debtor, and its amount. The principles which have

been stated and illustrated in the adjudications of the supreme court of the United States have been accepted here and recognized. 4 How. 231; 5 S. & M. 347. The character of Montgomery's letter of credit, or guaranty, entitled him to notice that it was accepted by the plaintiffs, and that they would act under it; and also, after the transaction was closed, and the debt became due from Coody, that he had failed to make payment. And this last information must be communicated within a reasonable time after default made, unless, indeed, there was some reason potent enough to relieve of the duty of imparting notice. For it should be borne in mind that the object of the information is to enable the guarantor to protect and save himself from loss. If notice, by no possibility, could be of service to him, as where the debtor was absolutely and hopelessly insolvent, then it seems it may be dispensed with. It must be observed, also, that the same promptness is not exacted, in giving notice, as the law merchant demands of the dishonor of commercial paper. The latter is of strict right, and whilst letters of credit, or of guaranty, are of commercial origin, and, of consequence, have drawn to their construction and import the principles of commercial law, they stand, as to this matter, on a broader ground than negotiable paper. Generally, if the debtor was insolvent when the debt became due, and has ever since so continued, no notice to the guarantor is necessary—not even a demand of payment of the debtor when the debt became due. Warrington v. Furbor, 8 East R. 242; Van Wirt v. Wilkins, 3 Barn. & Cress. 439-447.

We will refer now to the testimony, and see what evidence went to the jury as to notice of acceptance and notice of default. Robert Coody deposed that H. C. Coody applied to Kellogg & Sandusky to furnish him with supplies; they refused unless the defendant, Montgomery, would guarantee payment. Mr. Kellogg, of the firm, wrote the letter of guaranty, which they required Montgomery to sign before they would open the account. The paper was handed to Judge Montgomery, who signed it. It was then taken to Kellogg & Sandusky. About the time of opening the account, and after Montgomery had knowledge of the credit, he asked witness if goods were got on the faith of this paper, witness answered affirmatively. At Montgomery's house, about the time they were fairly picking cotton, and before disposing of any cotton Montgomery said he

was in receipt of a letter, stating that Coody's account was due and unpaid, and asking what arrangement was made for payment. Montgomery had notice within ten days after the account was opened.

H. C. Coody says that Kellogg & Sandusky agreed to supply him goods on the guaranty of Montgomery. Demand of payment of the account was made on Coody, shortly after it was due, and a letter written by the book-keeper to Montgomery, notifying him of non-payment.

The testimony on behalf of the defendant does not agree in several particulars—as to date of notice of default particularly. The testimony was quite enough to justify the jury in the conclusion that Montgomery received notice that the goods would be advanced on his guaranty. The notice, whether of acceptance or of default in payment, need not be given in any precise form, nor in writing, but may be inferred from facts and circumstances in the evidence. Reynolds v. Douglas, 12 Peters, 496; Oaks v. Weller, 16 Vt. 70.

What is a reasonable time for the performance of an act is, by the authorities, rather referred to the court as a question of law than of fact to the jury. In the administration of justice, there are many cases where certain general propositions can be laid down, but when they come to be applied they encounter a variety of incidents unforeseen and not before contemplated, and in reference to which no general rule could beforehand be prescribed; the court must exert its best discretion and judgment in determining what the law must be deemed to be as applicable thereto. Such is the inevitable result of all things depending on human foresight.

Precedents often cannot, on account of the endless variety and complication of transactions, dissimilar often to any that have occurred in any previous case, be referred to as aiding in the formation of a judgment on a proposition like this. Therefore, the great propriety of the suggestion of Judge Story in the case of Wilds v. Savage, 1 Story, 22, that it is difficult, and perhaps dangerous, to attempt to lay down any general rule as to what is reasonable notice, leaving each case to stand on its own distinguishing and special features.

In the cases cited from 7 Peters, 113, and 10 id. 482, it was said the guarantor must have notice of the amount for which he is held, as well as default of the principal debtor in a rea-

sonable time. But it is not attempted to define what would be reasonable time. In Howe v. Nichols, 22 Me. 178, the court expressed an appreciation of the intrinsic difficulty, if not impossibility, of laying down any precise rule.

As respects negotiable paper, the custom of merchants and the decisions of the courts have given precision and definiteness as to what shall constitute reasonable notice to drawers and indorsers. But, as we have already said, the same strictness does not apply in favor of the guarantor.

Looking to the special facts in this case, we are of opinion that Montgomery had notice, within reasonable time, of the non-payment by the principal debtor. For the fundamental principle as the basis of the rules on this subject is, did the want of notice or delay to give it operate injuriously to the guarantor? If so, he is to be released according to the circumstances *pro tanto* or *in toto*. 1 Story, 22; 22 Me. 179. Testimony was before the jury, to the effect that whilst Coody was gathering his cotton, and before any of it was sold, Montgomery had knowledge that the account had not been paid, and that he was looked to for payment. Referring to the letter of credit, the first sentence reads thus: "Mr. H. C. Coody proposes to purchase some supplies, payable out of the first proceeds of his crop." The cotton was the fund out of which payment was to be made. It was because of Montgomery's confidence in this resource that he incurred the liability. Having notice before any of the cotton was sold, it was in time to enable him, if he could, to obtain indemnity, or see to the application of the cotton to the debt. It is not shown that he has lost anything, or any opportunity to save himself from loss, by not receiving earlier advice.

The letter of Montgomery, in evidence to the jury, does not claim exemption from liability on the want of notice; but rather that the goods were furnished R. Coody, for whom he was not surety, and a claim that H. C. Coody must be first sued, as defendant was only surety. The instructions to the jury accord with these views. Perhaps the third instruction granted on the prayer of the defendant is broader than would be warranted by the authorities, and was certainly as favorable to the defendant as he could ask; but as to this we are called upon to give no opinion.

It is complained that the court erred in refusing a prayer

in these words: "If the jury believe, from the evidence, that the defendant has incurred any liability, it is as surety for H. C. Coody, the principal, and that said defendant gave written notice to the creditors, plaintiffs in this action, to commence and prosecute legal proceedings against said principal debtor, and the plaintiffs refused to do so, to the next term, to be held thirty days after giving notice, and to prosecute the same to effect, the defendant is discharged from liability," etc. The principle embraced in this prayer has no application of fitness to the facts of the case, and therefore the court was right in withholding it from the jury. On the acceptance of the guaranty and notice of non-payment by Coody, the liability of Montgomery became fixed and absolute, with an immediate right of action against him—an original liability.

The decisions of the circuit court on the several points raised in that court being in accord with these views, we affirm the judgment. *Judgment affirmed.*

RAPELYE v. BAILEY. 1820.

3 Conn. 438; 8 Am. Dec. 199.

Assumpsit. The declaration contained seven counts. The first count alleged a promise by defendant, Roger Bailey, to pay to plaintiffs, absolutely the value of certain goods furnished to his brother Roswell. The second count alleged a promise to pay at the time agreed upon by Roswell, of which time, it was alleged, defendant had notice. The third count alleged a promise in a similar form. The fourth count was on a *quantum meruit;* the fifth, like the last, alleging a delivery to the defendant; the sixth count was for goods sold and delivered to the defendant. The seventh count set forth the promise to pay for goods furnished Roswell, and alleged further that the latter had given his promissory note for the value of the goods, but that he had become insolvent and the note remained unpaid, of which defendant was averred to have had notice. Plea, non-assumpsit. The written promise of the defendant to pay for the articles furnished appears from the opinion. The defendant requested an instruction to the jury that the letter of credit was not a direct and original undertaking on his part, and that

he was not liable without an averment and proof of special notice. The judge refused this instruction, and charged that the letter was a direct and original undertaking, on the part of the defendant. Verdict for the plaintiff, and motion for a new trial.

PETERS, J. The declaration contains seven counts. The object of the pleader in ringing so many changes on a plain, concise written contract, is not apparent. I mention this circumstance merely to express the regret I feel, when called to witness a departure from the simplicity of our ancient practice, so much better calculated to administer speedy and substantial justice, than the labyrinths of British models, which are as useless to us as the titles, as the robes and the wigs of their reverend judges.

To support this declaration the plaintiffs give in evidence a letter from the defendant in these words: "Messrs. Rapelye & Purdy: Gentlemen, my brother, Roswell, is wishing to go into business in New York, by retailing goods in a small way. Should you be disposed to furnish him with such goods as he may call for from three hundred to five hundred dollars worth, I will hold myself accountable for the payment, should he not pay, as you and he shall agree. Roger Bailey." This the defendant contended was a collateral, and not a direct undertaking, and did not entitle the plaintiffs to recover, without averring and proving a special notice, and requested the judge so to instruct the jury. But the judge informed them that this letter was "a direct and an original undertaking," meaning as I understood the motion, that it rendered the defendant liable as principal, and not as a guarantor. By the terms of this letter Roswell Bailey was to become the purchaser and debtor, and the defendant a mere surety, and his contract, when accepted, was literally and strictly a guaranty. "I will," said the defendant, "hold myself accountable for the payment, should he not pay as you and he shall agree." The acceptance of this proposition, the amount of credit given under it, the time and terms of payment agreed on, were never made known to the defendant until the commencement of this suit. The averment "whereof the defendant had due and legal notice," is sufficient, it is no more than *lict seapius requisitus*, and would ~~have been~~ cause of demurrer, and not of a new trial, were it not for the rule, that such defects are cured by verdict. But where notice

and request are by law necessary, there the general averment will not be sufficient, but it must be particularly set forth, that the court may judge whether the notice or request was sufficient: 1 Chit. Pl. 319; Wallis v. Scott, 1 Str. 88. Thus in Pack v. Methold, Poph. 160, the opinion of the court was strongly, "that the plaintiff ought to have alleged the request specially, and certainly in time and place, because the fact is traversable." In Peel v. Tatlock, 1 Bos. & P. 419, EYRE, C. J., seems to have been of opinion that in guaranties for good behavior, notice of any embezzlement ought to be given in a reasonable time; and in Russell v. Clark, 7 Cranch, 69, it was distinctly holden by the supreme court of the United States, that if the contract in that case had been a guaranty, it would have been the duty of the plaintiff to give immediate notice to the defendant of the extent of his engagement. I, therefore, think that the judge ought to have directed the jury to find for the defendant, unless it was proved that he had such notice.

If this reasoning be correct, a new trial must be granted. But the motion presents other grounds. The letter in question proves neither count in the declaration. I take the law to be settled, that where there is an express contract, it extinguishes the implied one, Shelton v. Darling, 2 Conn. 435. In Cutter v. Powell, 6 T. R. 320, 324, Lord Kenyon says, "that where the parties have come to an express contract, none can be implied, has prevailed so long as to be reduced to an axiom in the law." And the defendant ought to have notice by the declaration that he is sued upon it: Weston v. Downes, Doug. 23. And every such contract must be proved as laid: Gwinnett v. Phillips, 3 T. R. 643, 646; Bristow v. Wright, Doug. 640; Anon., 1 Ld. Raym. 735; Saxton v. Johnson, 10 Johns. 418; Thompson v. Jameson, 1 Cranch, 282; Phil. Ev. 168.

The letter in question furnishes evidence of an express contract; and, therefore, does not support a general *indebitatus* assumpsit, as laid in the fourth, fifth and sixth counts. It is a collateral undertaking to pay, if the debtor did not; and, therefore did not authorize the plaintiffs to make their charge to the defendant directly, as laid in the third count. The two first counts being special, must be proved as laid. In the first it is averred that the defendant promised to be answerable for the money at the proper time of payment. But the defendant said, "I will hold myself accountable for the payment, should

he not pay as you and he shall agree." In the second count it is averred, "that the defendant promised that said money should be regularly paid as said Roswell should agree," absolutely. But the promise is conditional.

The seventh count not only sets out a contract variant from the guaranty, but a waiver or extinguishment thereof by a new obligation from the principal debtor. This, according to the civil law whence most of our principles relative to contracts are derived, is a discharge of the guaranty. Thus saith Pothier, Treatise on Obligations, part 2, c. 6; "As suretyship is an accessory obligation to that of the principal debtor, the extinction of the principal obligation carries with it the extinction of the suretyship also. Likewise, the security is discharged by the novation that is made of the debt; for the security can no longer be bound for the first debt for which he became security of the debtor, since it no longer exists, having been extinguished by the novation." Though this is not a common law authority, "the greatest portion of it," according to Sir William Jones, "is law at Westminster as well as at Orleans." The same doctrine is laid down by Domat, lib. 3, tit. 4, sec. 5. "If the debt is innovated between the creditor and the debtor, without the surety's obliging himself anew, his obligation does not subsist any longer."

I advise a new trial.

The other judges were of the same opinion, except HOSMER, C. J., who having been absent when the case was argued, gave no opinion.

New trial to be granted.

LEE v. DICK. 1836.

10 Peters 482.

The case is stated in the opinion of the court.

THOMPSON, C. J., delivered the opinion of the court.

This case comes up on a writ of error from the circuit court of the United States for West Tennessee. It was a special action on the case, on a guarantee given by the plaintiff in error in favor of Nightingale and Dexter. The declaration is spe-

cial, stating that the defendant in the court below, by his guarantee bearing date the 24th of September in the year 1832, directed and addressed to the plaintiffs below, requested them to accept the draft of Nightingale and Dexter for the amount of $2,000, and thereby promised to guarantee the punctual payment of the same to that amount; and avers that Nightingale and Dexter afterwards, on the 5th of October, 1832, drew a bill on the plaintiffs below for $4,250; and that, confiding in the promise of the defendant, they accepted the same, etc. The declaration contains a count alleging an agreement by the defendant to guarantee the payment of $2,000, part of the $4,250; with the necessary averments to charge the defendants with the payment of the $2,000.

The defendant pleaded the general issue and upon the trial of the cause the plaintiffs produced the following evidence:

Memphis, September 24, 1832.

"Messrs. N. and J. Dick & Co.

"Gentlemen: Nightingale and Dexter, of Maury county, Tennessee wish to draw on you at six or eight months date. You will please accept their draft for $2,000, and I do hereby guarantee the punctual payment of it. Very respectfully, your obedient servant,

Samuel B. Lee."

Nashville, October 5, 1832.

"Exchange for $4,250.00.

"Six months after date of this first of exchange, (second unpaid), pay to H. R. W. Hill, or order, 4,250 dollars—cents, value received and charge the same to account of yours, etc.

"Nightingale & Dexter,

"To N. and J. Dick and Co., New Orleans."

The plaintiff also offered in evidence the following letter of the defendant, Samuel B. Lee; which letter was written upon the same sheet of paper with the guarantee, but on different parts of it:—

"Memphis, September 24, 1832.

"Mr. P. B. Dexter.

"Dear Sir: Yours of the 15th instant came to hand in due time. I was absent, or should have answered it sooner. I left Mount Pleasant sooner than I had expected when I saw you last. I learned that my presence was wanted at Savannah, and put o. p. h. I had calculated to get along with business with-

out having any thing to do with drawing bills or with the bank; but there is no cash in this quarter, and our bills at the East are falling due, and I have no other alternative but to draw for what funds I am compelled to have, and may, during the winter, (should I go largely into the cotton market), wish to draw for a considerable amount I have no objections to guarantee your bill, except it might affect my own operations. I however, send a guarantee for $2,000, which you can use if you choose. The balance, I have no doubt, your friend, Mr. Watson, will do for you. I would cheerfully do the whole amount, but expect to do business with that house, and do not wish to be cramped in my own operations. Spun thread, also coarse homespun are in good demand. My compliments to Mrs. and Miss Nightingale. Your friend,

SAMUEL B. LEE."

It was agreed by the counsel, that the bill of exchange and letter should go to the jury, and their effect, etc., be charged upon by the court. The plaintiff proved that N. and J. Dick and Co. accepted the above bill, upon the faith of the said guarantee, and that they had paid it, and gave notice to the defendant that they looked to him for the money. The court charged the jury, that if the defendant intended to guarantee a bill of exchange to be drawn for $2,000, he would not be liable for a bill drawn for upwards of $4,000. But if he intended to guarantee $2,000 of a bill to be drawn for a larger amount, then he would be liable for the $2,000. That the court was of opinion that the letter accompanying the guarantee was admissible in evidence, to explain whether the guarantor meant to guarantee a bill for $2,000, or only $2,000 in a bill for a larger amount. The court also charged the jury that no notice by N. and J. Dick and Co. to the defendant, that they intended to accept, or had accepted, and acted upon this guarantee, was necessary. To which opinion of the court the defendant excepted.

The questions arising upon this case are:

1st. Whether this evidence will warrant the conclusion, that the defendant intended to guarantee $2,000 in a bill to be drawn for a larger sum.

2dly. Whether N. and J. Dick and Co. were bound to give notice to the defendant that they intended to accept, or had accepted and acted upon the guarantee.

A guarantee is a mercantile instrument, and to be construed according to what is fairly to be presumed to have been the

understanding of the parties, without any strict technical nicety. If the guarantee stood alone, unexplained by the letter which accompanied it, it would undoubtedly be limited to a specific draft for $2,000, and would not cover that amount in a bill for a larger sum; but the latter which accompanied it fully justifies the conclusion that the defendant undertook to guarantee $2,000 in a draft for a larger amount. The letter and guarantee were both written by the defendant, on the same sheet of paper, bear the same date, and may be construed together as constituting the guarantee. 7 Cranch, 89. This letter is obviously in answer to one received from Dexter, one of the firm of Nightingale and Dexter; for he says, "Your letter of the 15th instant came to hand in due time, etc. I have no objection to guarantee your bill, except it might affect my own operations. I, however, send a guarantee for $2,000, which you can use if you choose." This was clearly in answer to an application to guarantee a larger sum; and admits of no other construction than that he should have no objection to guarantee the whole sum he requested, if he was not under apprehensions that it would affect his own operations. The bill not having been drawn until the 5th of October, eleven days thereafter, the letter must have referred to a bill he wished to draw. But this is not all. He adds: "The balance I have no doubt your friend, Mr. Watson, will do for you." The balance! What balance could this mean? Clearly the balance between the $2,000 for which he sent the guarantee, and the amount of the sum mentioned in the letter for which he wanted a guarantee. And again he says: "I would cheerfully do the whole amount, but expect to do business with that house, and do not wish to be cramped in my own operations." The whole amount! What amount is here referred to? This admits of no other answer, than that it was the amount of the sum mentioned in the letter he had written to Dexter, in which he requested a guarantee. The opinion of the circuit court, therefore, upon the construction of the guarantee was correct.

The next question is whether the plaintiffs were bound to give notice to the defendant, that they intended to accept or had accepted and acted upon this guarantee. It is to be observed, that this guarantee was prospective, it looked to a draft thereafter to be drawn; and this question is put at rest by the decisions of this court. The case of Russel v. Clark's Executors, 7 Cranch, 91, was a bill in chancery to recover a sum of money

upon a guarantee alleged to grow out of several letters written by Clark and Nightingale to Russel. The court say: "We cannot consider these letters as constituting a contract by which Clark and Nightingale undertook to render themselves liable for the engagements of Robert Murray and Co. to Nathaniel Russel. Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendant of the extent of his engagements." Although the point now in question was not precisely the one before the court in that case, as there was no contract or guarantee made out, yet it is laid down as a settled and undisputed rule. The case of Edmondson v. Drake and Mitchell, 5 Pet. 624, was an action founded on a letter of credit given by Edmondson to Castello and Black, as follows: "Gentlemen: The present is intended as a letter of credit in favor of my regarded friends, Messrs. J. and T. Robinson, to the amount of $40 or 50,000; which sum they wish to invest through you in the purchase of your produce. Whatever engagements these gentlemen may enter into will be punctually attended to."

On the trial, the court was requested to instruct the jury, that in order to make the defendant liable to the plaintiff under the contract, they were bound by the law merchant to give him due notice. Upon this prayer the court was divided, and the instruction was not given; and this court decided that the instruction ought to have been given. The court said it would indeed by an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions, which is an important principle in the law and usages of merchants, if a merchant should act on a letter of this character, and hold the writer responsible without giving notice to him that he had acted on it. The authorities on this point, say the court, unquestionably establish this principle. And again, the case of Douglas *et al.* v. Reynolds *et al.* 7 Pet. 125, was an action upon a guarantee; and the court was requested to instruct the jury, that, to enable the plaintiff to recover on the letter of guarantee, they must prove that notice had been given in a seasonable time after said letter of guarantee had been accepted by them, to the defendant, that the same had been accepted. This instruction the court below refused to give; and this court say the instruction asked was correct, and ought to have been given. That a party giving a letter of guarantee has a right to know whether

it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given. Especially, it is important in case of a continuing guarantee, since it may guide his judgment in recalling or suspending it. This last remark by no means warrants the conclusion that notice is not necessary in a guarantee of a single transaction; but only that the reason of the rule applies more forcibly to a continuing guarantee. It is unnecessary, after such clear and decided authorities in this court on this point, to fortify it by additional adjudications. We are not aware of any conflict of decisions on this point; and if there are, we see no reason for departing from a doctrine so long and so fully settled in this court.

We do not mean to lay down any rule with respect to the time within which such notice must be given. The same strictness of proof is not necessary to charge a party upon his guarantee, as would be necessary to support an action upon the bill itself; when, by the law merchant, a demand upon and refusal by the acceptors must be proved in order to charge any other party upon the bill. 8 East, 245. There are many cases where the guarantee is of a specific existing demand by a promissory note or other evidence of a debt; and such guarantee is given upon the note itself, or with a reference to it and recognition of it, when no notice would be necessary. The guarantor, in such cases, knows precisely what he guarantees, and the extent of his responsibility; and any further notice to him would be useless. 14 Johns. 349; 20 Ib. 365. But when the guarantee is prospective, and to attach upon future transactions, and the guarantor uninformed whether his guarantee has been accepted and acted upon or not, the fitness and justice of the rule requiring notice is supported by considerations that are unanswerable.

We are, accordingly, of opinion that the circuit court erred in deciding that notice was not necessary, and that the judgment must be reversed.

DAVIS SEWING MACHINE COMPANY v. RICHARDS.
1885.

115 U. S. 524; 6 Sup. Ct. Rep. 173.

In error to the supreme court of the District of Columbia.

GRAY, J. This was an action, brought in the supreme court of the District of Columbia, upon a guaranty of the performance by one John W. Poler of a contract under seal, dated December 17, 1872, between him and the plaintiff corporation, by which it was agreed that all sales of sewing machines which the corporation should make to him should be upon certain terms and conditions, the principal of which were that Poler should use all reasonable efforts to introduce, supply and sell the machines of the corporation, at not less than its regular retail prices, throughout the District of Columbia and the Counties of Prince George and Montgomery, in the State of Maryland, and should pay all indebtedness by account, note, indorsement or otherwise, which should arise from him to the corporation under the contract, and should not engage in the sale of sewing machines of any other manufacture; and that the corporation, during the continuance of the agency, should sell its machines to him at a certain discount, and receive payment therefor in a certain manner; and that either party might terminate the agency at pleasure.

The guaranty was upon the same paper with the above contract, and was as follows:

"For value received, we hereby guarantee to the Davis Sewing Machine Company, of Watertown, New York, the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness, by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract to the amount of Three Thousand ($3,000) Dollars.

"Dated Washington, D. C., this 17th day of December, 1872.

"A. ROTHWELL,
"A. C. RICHARDS."

Under the guaranty were these words: "I consider the above sureties entirely responsible. Washington, Dec. 19, 1872.

"J. T. STEVENS."

At the trial the above papers, signed by the parties, were given in evidence by the plaintiff, and there was proof of the following facts: On December 17, 1872, at Washington, the contract was executed by Poler, and the guaranty, after being so signed, were delivered by the defendants to Poler, and by Poler to Stevens, the plaintiff's attorney, and by Stevens afterwards forwarded, with his recommendation of the sureties, to the plaintiff at Watertown in the State of New York, and the contract there executed by the plaintiff. The plaintiff afterwards delivered goods to Poler under the contract, and he did not pay for them. The defendants had no notice of the plaintiff's execution of the contract, or acceptance of the guaranty, and no notice or knowledge that the plaintiff had furnished any goods to Poler under the contract or upon the faith of the guaranty, until January, 1875, when payment therefor was demanded by the plaintiff of the defendants and refused. At the time of the signing of the guaranty, the plaintiff had furnished no goods to Poler, and the negotiations then pending between the plaintiff and Poler related to prospective transactions between them.

The court instructed the jury as follows: "It appearing, at the time the defendants signed the guaranty on the back of the contract between plaintiff and Poler, the plaintiff had not executed the contract or assented thereto, and that the contract and guaranty related to prospective dealings between the plaintiff and Poler, and that subsequently to the signing thereof by the defendants the attorney for the plaintiffs approved the responsibility of the guarantors and sent the contract to Watertown, New York, to the plaintiff, which subsequently signed it, and no notice having been given by the plaintiff to the defendants of the acceptance of such contract and guaranty, and that it intended to furnish goods thereon and hold the defendants responsible, the plaintiff cannot recover, and the jury should find for the defendants."

A verdict was returned for the defendants, and judgment rendered thereon, which on exceptions by the plaintiff was affirmed at the general term, and the plaintiff sued out this writ of error, pending which one of the defendants died and his executor was summoned in.

The decision of this case depends upon the application of the rules of law stated in the opinion in the recent case of Davis

v. Wells, 104 U. S. 159, in which the earlier decisions of this court upon the subject are reviewed.

Those rules may be summed up as follows: A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use complete the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of a guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantor from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The plaintiff's original contract with the principal debtor was not executed by the plaintiff until after that. The guarantors had no notice that their sufficiency had been approved, or that their guaranty had been accepted, or even that the original contract had been executed or assented to by the plaintiff, until long afterward, when payment was demanded of them for goods supplied by the plaintiff to the principal debtor.

Judgment affirmed.

End

CHAPTER VI.
CHANGE OF CONTRACT.

a. Any material change in the contract between the principal debtor and his creditor, whether to the disadvantage of the surety or not, will release the latter unless he consents to the change.

HALL v. PEYSER. 1879.

126 Mass. 195.

Contract on the following instrument in writing, dated October 2, 1876, and signed by the defendant; "In consideration of one dollar to me paid by George F. Hall, of Boston, and for the purpose of securing a credit with him for Isidore Patterson, I hereby guarantee the full and punctual payment to George F. Hall of all indebtedness which said Isidore Patterson may incur for purchase of goods, wares and merchandise from said George F. Hall, whether such purchase shall be made on credit or otherwise, or secured by note or otherwise, without requiring notice of any kind with respect thereto. This guaranty to be an open and continuing one until revoked by notice in writing from me; it being understood that her liability thereunder shall not at any one time exceed one thousand dollars. Answer, a general denial.

At the trial in the superior court, before DEWEY, J., without a jury, it was admitted that, on October 10, 1877, there was due to the plaintiff for merchandise previously sold and delivered by him to Patterson, the sum of $53.32. The plaintiff offered evidence that, prior to October 10, the firm of Sayre & North, of New York, had delivered goods at different times to Patterson to be by her manufactured for them and returned to them; that they were to pay her for her services in manufacturing the goods; that she did not return the goods, but disposed of the same for her own use and benefit, and thereafter, about October 10, they requested her to return the goods, at the same time charging her with having wrongfully disposed of them for her own benefit; that she then requested them to make a bill of the goods to the plaintiff; that they did so, and the plaintiff made a bill of the same to Patterson; and that this arrangement was made after the delivery of all the goods to Patterson by Sayre

& North. The plaintiff admitted that he had never had possession of the goods. These goods amounted to $576.50.

Upon this evidence the judge ruled that the plaintiff could only recover for the goods actually sold and delivered by him to Patterson; and found for the plaintiff in the sum of $53.32 and interest. The plaintiff alleged exceptions.

Ames, J. The transaction described in this bill of exceptions was a mere evasion of the plain meaning of the defendant's contract. There was no sale by Sayre & North to the plaintiff. The goods never were his property, or in his possession, and he never sold them to Patterson. It was correctly ruled that the plaintiff was not entitled to recover anything beyond the charge for merchandise delivered before October 10, 1877.

Exceptions overruled.

UNITED STATES v. BOECKER. 1874.

21 Wall. 652.

Error to the circuit court for the District of Maryland.

The United States sued Henry Boecker, principal, and C. Schorr and F. Altevoght, his sureties, in a distiller's bond. The bond was in the penal sum of $6,000, and conditioned that, whereas the said Henry "is now, or intends, on and after the 4th day of May, 1869, to be a distiller within the second collection district of the State of Maryland, to-wit, at the corner of Hudson street and East avenue, situate in the town of Canton, County of Baltimore and State aforesaid; now, if the said Henry shall in all respects faithfully comply with all the provisions of law in relation to the duties of distillers" etc., "then this obligation to be void, otherwise it shall remain in full force."

It was proved upon the trial that Boecker was largely indebted to the United States "for taxes assessed against him in respect to his business of distilling, carried on by him at his distillery at the corner of Hudson and Third streets, in the town of Canton, for the months of May, June, July, August, September, October, November, and December, in the year 1869, and that the said taxes remained unpaid." It was further proved "that no distillery at any other place was carried on by said

Boecker, and that there was not any distillery at the corner of Hudson street and East avenue,'' and that the latter place was about four squares from the former.

The defendants Schorr and Altevoght thereupon prayed the court to instruct the jury that if they ''shall find from the evidence that no distillery was ever carried on by the said Boecker, at the corner of Hudson street and East avenue,'' ''they would find their verdict for the defendants, although they may find that said Boecker carried on a distillery at some other place at Canton, and for his operations at which place he became indebted in this suit.''

This instruction was given. The United States excepted. The jury found for the defendants, and judgment being entered accordingly, the case was brought here.

The bond was taken under the act of July 20th, 1868. Its provisions bearing upon the subject are as follows:

''Section 1. Every proprietor or possessor of a still, distillery, or distilling apparatus, and every person in any manner interested in the use of any such still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and the tools therein, on the lot or tract of land whereon the said distillery is situated, together with any building thereon, from the time said spirits are distilled until the said tax shall be paid.

''Section 6. Every person engaged, or intending to be engaged, in the business of a distiller or rectifier, shall give notice in writing, subscribed by him, to the assessor of the district within which said business is to be carried on, stating his name and place of residence, and, if a company or firm, the name and place of residence, of each member thereof, and the place where such business is to be carried on, and whether of distilling or rectifying; and, if such business be carried on in a city, the residence and place of business shall be indicated by the name of the street and the number of the building.''

In the case of a rectifier the notice must state ''the precise location of the premises where such business is to be carried on,'' and that the ''establishment is not within six hundred feet of the premises of any distillery,'' etc. In case of change in the location, etc., of a distillery, notice in writing is required to be

given to the assessor or his assistant within twenty-four hours. Every notice required by this section shall be "in such form, and shall contain such additional particulars, as the Commissioner of Internal Revenue shall from time to time prescribe.... Any person failing or refusing to give such notice shall pay a penalty of $1,000, and, on conviction, shall be fined not less than $100 nor more than $2,000, and any person giving a false or fraudulent notice shall on conviction, in addition to such penalty or fine, be imprisoned not less than six months nor more than two years."

Section seven prescribes the bond to be given. It is to have two sureties, and one of the conditions required is that the distiller "will not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be incumbered by mortgage, judgment, or other lien during the time in which he shall carry on said business."

Section eight enacts that the bond is not to be approved unless the distiller is the owner in fee, unincumbered, of the lot or tract of land on which the distillery is situated, or unless he files with the assessor the written consent of the owner of the fee and of any incumbrance, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and stipulating that the lien of the United States for taxes and penalties shall have priority over such incumbrance, and that, in case of forfeiture of the premises, the title shall vest in the United States, discharged from such incumbrance, whatever it may be.

Section twelve forbids the use of any still, boiler, or other vessel for the purpose of distilling "within six hundred feet of any premises authorized to be used for rectifying," and declares that the offender against this, or either of the other prohibitions contained in this section, "shall, on conviction, be fined $1,000, and imprisoned for not less than six months nor more than two years, in the discretion of the court."

Mr. S. F. Field, for the United States, the plaintiff in error, argued that the locality where the distillery was intended to be placed, described in the bond, was immaterial, and that the sureties were liable for the defaults of their principal occurring where the distillery was situated, in all respects as if it had been located at the place named in the bond.

Messrs. E. O. Hinkley and J. V. L. Fintlay, for the sureties, cited numerous authorities to show that sureties were bound for

nothing whatever but that for which they agreed to be bound, and that courts favored them in the construction of their engagements. He argued accordingly that here they were not liable for the taxes.

Mr. Justice SWAYNE, having stated the case, delivered the opinion of the court, as follows:

The several provisions bearing on the subject, in the act of July 20th, 1868, under which the bond sued on in this case was taken, show the importance attached by the statute to the place as designated in the notice required to be given by the distiller before commencing business. Here the bond, it is to be presumed, followed the notice. The designation of the place is made important to the distiller, to his sureties, and to the government, in several respects. If the place be not as designated in the notice the distiller is outside of the law and liable to the penalties denounced by the sixth section. If it be within six hundred feet of premises authorized to be used for rectifying, he is liable to suffer as prescribed in the eighth section. The premises having been specified in the notice, the surety, before executing the bond, and the assessor, before taking it, may examine and determine how far, in the event of liability on the part of the principal, the property would be available as security for the government and indemnity for the surety.

If the proposition of the counsel for the United States were sustained, the designation of the place, as in this bond, instead of affording a limitation and a safeguard to the surety, might prove but a delusion and a snare, and subject him to liabilities which he could not have foreseen, and to the hazard of which he would not knowingly have exposed himself. In such cases, the United States having a lien, the surety is entitled to the benefit of it. He might be willing to bind himself where the lien was upon one piece or parcel of property, and unwilling where it was upon another. His ultimate immunity or liability might depend wholly upon the value of the premises. He had the option to assume the risk or not. This element may have controlled the exercise of his election.

Viewing the subject in the light of these considerations, we cannot assent to the view expressed by the counsel for the government. On the contrary, we think this term of the bond is of the essence of the contract. It is hardly less so than the amount of the penalty. One defines the place where the liability must

arise, the other the maximum of that liability for which the sureties stipulated to be bound. The former can no more be held immaterial than the latter. No distillery having been carried on at the place named, the contract never took effect. The event to which it referred did not occur. There could consequently be no liability within the letter or meaning of the contract. It was as if the agreement had been for the good conduct of a clerk while in the service of B., and the clerk never entered his service, but entered into the service of another. Distilling begun and carried on elsewhere was no more within the obligation of the sureties than if it had been begun and carried on there or elsewhere by a person other than Boecker. No other place than that named is, under the circumstances of this case, within the letter, spirit, or meaning of the bond. The specification has no elasticity. It cannot be made to extend to the locality where the distillery here in question was placed. In Miller v. Stewart this court said: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation he is bound, and no further. . . . It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it and a variation is made, it is fatal."

To the same effect is Ludlow v. Simond. There is no more learned and elaborate case upon the subject.

The leading English case is Lord Arlington v. Merricke.

These authorities are conclusive of the case before us. It is needless to analyze and discuss them. Others, without number, maintaining the same principle, might be referred to. Many of those most opposite to this case are cited in the argument of the counsel for the defendants in error. The rules of the common law upon the subject are as old as the Year Books. Those rules were doubtless borrowed from the earlier Roman jurisprudence, known as the civil law. They obtain throughout the States of our Union. The adjudications everywhere are in substantial harmony.

The question here was not as to the law in the abstract, but as to its application to the facts of the case.

. . . . . .

A careful examination has satisfied us that the learned judge upon the trial below instructed the jury correctly.

Judgment affirmed.

Mr. Justice BRADLEY (with whom concurred Justices CLIFFORD, DAVIS and STRONG) dissenting:

I dissent from the opinion of the court in this case. It seems to me that it has a tendency to cast every burden on the government and to unduly relieve the sureties of the distiller from responsibility for his acts. By the sixth section of the act of July 20th, 1868, every person intending to be engaged in the business of a distiller is to give notice in writing to the assessor of the district within which such business is to be carried on, stating his name and place of residence, and the place where said business is to be carried on; and if in a city, the residence and place of business is to be indicated by the name and number of the street. He is then, by the seventh section, to execute a bond with at least two sureties, to be approved by the assessor. Such a notice and such a bond were given in this case. The bond recited, in the preamble to the condition, the fact that the distiller intended to be engaged in the business of a distiller within the second collection district of the State of Maryland, to-wit, at the corner of Hudson Street and East Avenue, situate in the town of Canton, county of Baltimore. Then followed the terms of the condition, namely, that the distiller should in all respects faithfully comply with all the provisions of law, etc., and not suffer the lot on which the distillery stood to be incumbered, etc. Now the sureties contend that if the distillery is actually established on a different lot from that suggested in the recital, though only across the street, or even the adjoining lot on the same side, they are not bound. It seems to me that it is for them, and not for the government, to see that the distiller pursues his business on the lot which he gives notice to the assessor that he will use for that purpose. They are the guarantors of his conduct to the government, and not the government to them. If after starting his distillery he changes its location, or after giving notice of the location he changes his mind and commences business on another lot, the sureties ought to be bound for the regularity of his conduct. If he should not carry on business in the designated district, but in a different one, subject to the jurisdiction of another assessor, to whom the bond was not given, the result might be different.

But if he establishes it in the same district, the sureties ought to be liable. The condition is not that he shall comply with the law only on that particular lot. That can only be claimed as an inference of law. But does such an inference arise in this case? The fact that the distiller intended to pursue his business on that lot is mentioned, it is true, in accordance with his notice. But this is no part of the substance of the condition; the substance is that he was going to engage in the business of a distiller in that district, and the sureties guaranteed his compliance with the law. Where a sheriff or marshal is elected or appointed for a particular term, a bond given for the faithful discharge of his duties relates by implication of law to that term alone; and the sureties are not bound for a subsequent term in case of his re-election or reappointment. This is so, whether the condition recites the term of office for which the appointment was made or not. This is the reasonable inference from the whole transaction. But, in the case under consideration, the implication of law and the reasonable inference is that the sureties are bound for the conduct of their principal, though he should change the location of his distillery to any other place within the district. Otherwise the government is liable to be subjected to great frauds. It is the duty of the sureties, rather than that of the government officials, to see that no change is made without the distiller's pursuing the formalities required by the law. If it is made without those formalities, there would be stronger reason for holding that fact of itself as constituting a violation of the bond, than for holding that it discharges the sureties from all obligations whatever.

NEFF v. HORNER. 1870.

63 Pa. St. 327; 3 Am. Rep. 555.

Action to charge the sureties on a promissory note. The note was as follows:

"$500. November 13, 1865.

"One year after date we, or either of us, promise to pay to Samuel Horner the just sum of $500 in seven-thirties for value received of him, whereunto witness our hands and seals.

"Interest to be paid semi-annually.

"JACOB A. PENNINGTON,	(L.S.)	"THOMAS WILEY,	(L.S.)
"JOHN NEFF,	(L.S.)	"THOMAS CURL."	(L.S.)
"JOSEPH DOUGHERTY,	(L.S.)		

The words "interest to be paid semi-annually" were not in the note when the sureties signed it; but Pennington, the principal, took it to Horner, who refused to accept unless these words were inserted. Pennington then wrote the words in the note, at the same time stating that he had authority to do so, which was untrue. The pleas filed were *non est factum, nil debet,* and payment with leave. By neglect of the prothonotary the plea of *non est factum* was omitted from the trial list prepared for the judge, and the trial proceeded as if this plea had not been filed. While the court was charging the jury, it was discovered that the plea of *non est factum* was actually in, and the court was requested to take notice of this, but refused to do so, because the trial had been conducted on different pleas. Verdict for plaintiff for $503.37. Defendants appealed.

Agnew, J. It seems to be settled that a voluntary alteration of a bond, note, or other instrument under seal, in a material part, to the prejudice of the obligor or maker, avoids it, unless done with the assent of the parties to be affected by it. 1 Greenl. Ev., § 565; Marshall v. Gougler, 10 S. & R. 164; Barrington *et al.* v. Bank of Washington, 14 id. 422, 423; Foust v. Renno, 8 Barr, 378; Henning v. Werkheiser, id. 518, n.; Smith v. Weld, 2 id. 54. Such a willful act differs from spoliation by a stranger, or accidental alteration done through mistake, where the instrument remains effectual in law, as it was before alteration. 1 Greenl. Ev., §§ 566, 568.

In respect to bills, notes and other commercial paper, the rule is even more stringent, the law casting on the holder the burden of disproving any apparent material alteration on the face of the paper. Stephens v. Graham, 7 S. & R. 505; Simpson v. Stackhouse, 9 Barr, 186; Paine v. Edsell, 7 Har. 178; Miller v. Reed, 3 Casey, 244.

The only Pennsylvania case that seems to run against this strong current of authority is Worrell v. Gheen, 3 Wright, 388, but it is plainly exceptional. The opinion declares on the general principle strongly, but makes the case an exception on the ground that the plaintiff had no hand in the alteration, and because the case being stated for the opinion of the court, they were met by no discrepancy between the *allegata* and *probata.* How far the grounds of distinction may be deemed satisfactory it is of no importance, for it is sufficient that the case is made an exception expressly.

In the present instance, however, the plaintiff, who was examined on his own behalf, admitted that Pennington, the principal in the note, made the addition in his presence. He saw him do it. He would not take the note till Pennington did so. The latter said he had authority from his sureties, but this was untrue. The alteration was not accidental, and the plaintiff, though guiltless of the fraud, was foolish to accept a note he himself saw altered by the principal without being certain he had authority to bind his sureties. The alteration was material, for it added interest to the principal. It was not out of the way, so as to be no part of the note, for its position at the foot of the note, and by way of continuation, would have bound the sureties to the payment of interest had there been authority from them to write it there. It was material in the eyes of the plaintiff, for he refused to take the note without interest added to it, and brings the suit upon it in this altered state. The note was, therefore, avoided as to the sureties, and the court erred in holding that the plaintiff could recover the principal from all the parties, disregarding his claim for the interest. It is argued that a recovery of the principal sum does no harm, for to that extent the sureties bound themselves. But the conclusive answer is that stated by Mr. Greenleaf, *supra,* section 565. The ground of the rule is public policy to insure the protection of the instrument from fraud and substitution. The writing goes into the hands of the party who claims its benefit, and the purpose is to take away the motive for alteration, by forfeiting the instrument on discovery of the fraud. When the sureties signed it they had a right to have it delivered unaltered to the plaintiff. He was bound to know that the alteration was rightfully done, and that the penalty of his negligence, or his wrongful act, was a loss of the security.

As to the plea of *non est factum,* there ought to have been no difficulty. The plea was already on the record, and it was the mere oversight of the clerk that it did not appear on the judges' trial list. Consequently, when informed of the fact, the plea should have been allowed its proper effect; and if the court thought the plaintiff was taken by surprise, a juror might have been withdrawn, or such order made as would prevent injustice. But, as the case was submitted, a wrong was done to the defendant, which could be repaired only by a new trial; for the effect of disregarding the plea of *non est factum* on the

record was to deprive the defendant of a defense which struck at the very marrow of the plaintiff's case.

Judgment reversed, and a venire facias de novo awarded.

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b. Any valid extension of time given to the principal debtor without consent of the surety will release the latter.

HALLOCK v. YANKEY. 1889.

102 Wis. 41; 78 N. W. Rep. 156; 72 Am. St. Rep. 861.

Appeal from Dodge county court; M. S. GRISWOLD, Judge.

Action by W. E. Hallock against G. Yankey and M. Hartzheim. Judgment for defendants, and plaintiff appeals. Affirmed as to Hartzheim, and reversed as to Yankey.

This was an action against the defendants to enforce their liability as guarantors of a promissory note. The defense was that the note had been extended by the holder thereof without the consent of the defendants, and consequently that they were released from liability. The evidence was meager, and showed that on the 23d day of October, 1891, the Juneau Manufacturing Company, a corporation of Juneau, Wis., borrowed $200 at the Citizens' Bank of Juneau, and executed a note for the sum, payable 10 days after date, with interest at 8 per cent. per annum. The defendant Yankey was the treasurer and financial manager of the Juneau Manufacturing Company, and executed the note on behalf of the company. At the time the note was given a written guaranty of payment was indorsed upon the back, signed by the defendants Yankey and Hartzheim, both of whom were stockholders in the corporation, and Yankey was, as before stated, the treasurer of the corporation. On the 3d day of November, when the note fell due, it was not paid, but the interest was paid in advance for 30 days, and the bank indorsed an extension for 30 days on the back of the note, in consideration of the advance payment of interest. At the time of this extension both Mr. Yankey and Mr. Hartzheim were present, and Mr. Yankey, acting for the corporation, paid the advance interest, in order to procure the extension; but it does not appear that Mr. Hartzheim actively participated either in the pay-

ment of the interest or in the request for the extension. The note was extended several times afterwards, and like agreements of extension indorsed upon the bank, and the interest paid in advance each time by Mr. Yankey, as treasurer of the corporation; but the evidence does not show that Mr. Hartzheim had anything to do with the subsequent extensions, or even that he knew of them. The note was transferred to the plaintiff for value, before the commencement of this action. Upon this evidence the court directed a verdict for the defendants, and from judgment upon such verdict the plaintiff appeals.

WINSLOW, J. (after stating the facts). As to the defendant Hartzheim there can be no doubt that the verdict was rightly directed. His liability was that of a surety alone, and, upon very familiar principles of law, he was discharged if the time of payment of the note was definitely extended by a valid agreement without his consent. Machine Co. v. Oberreich, 38 Wis. 325. Whatever may be the fact as to Hartzheim's presence at the time of the first extension of the note, it appears without dispute that the note was definitely extended in consideration of the prepayment of interest a number of times afterwards, without his presence or consent. The payment of interest in advance is a sufficient consideration for the agreement of extension of time. Bank v. McDonald, 77 Wis. 486, 46 N. W. 902.

As to Yankey, however, the question is different. The evidence seems to show satisfactorily that he was the acting officer of the corporation, not only in executing and delivering the note originally, but in paying the interest in advance at the time of each extension. There is certainly sufficient evidence to justify a jury in finding that he, in legal effect, requested each extension of time, and paid the advance interest in order to secure such extension. It is true that he made such requests and payments in his capacity as an officer of the corporation and on its behalf, and that nothing was said as to his individual liability as guarantor; and the question presented is whether, having requested and consented to the extension on behalf of the corporation, he can be heard to say that he did not thereby consent to the extension in his individual capacity as guarantor. Of course, the obligations of a surety are *strictissimi juris.* He may stand upon the letter of his contract. He may have knowledge that an extension has been granted to his principal,

and the law does not impose on him the duty to speak. 2 Brandt, Sur. § 345. But the surety is bound by the rules of good faith and fair dealing, as well as other men. If he, as agent for the principal debtor, requests and obtains an extension of time, and pays the consideration for such extension, and nothing is said as to his liability as surety, it is very obvious that the creditor would naturally and almost inevitably conclude that he consents to the extension individually, as well as in his capacity as agent. How many bankers or business men would reason thus, "Yankey has consented to the extension as treasurer of the corporation, but has not consented in his individual capacity, and I must now ask him if he consents as Mr. Yankey?" We think very few would think of drawing such fine lines of distinction. After Yankey requested and procured the extension on behalf of the corporation, and gave no notice to the creditor that he did not consent to an extension in his character as surety, we think that well-known rules of estoppel must be held to prevent him from asserting that he is discharged as surety because of lack of consent. He has actively induced a change of position on the part of his creditor, which he will not be allowed to take advantage of, to his creditor's injury.

Another question here arises, namely, as to the effect of the discharge of Hartzheim upon the liability of Yankey. While his discharge is, in effect, a discharge by operation of law, still it resulted from the act of the creditor in extending the time of payment without the surety's consent; consequently, it must be given the same effect as a voluntary release. Robertson v. Smith, 18 Johns. 459. There is no doubt but that the provisions of section 4204, Rev. St. 1898, apply to joint sureties as well as to principal debtors, save in so far as they are limited by the proviso and by the terms of section 4205. Neither of these limitations includes the present case. Therefore the release of Hartzheim will operate to relieve his co-surety from liability for one-half of the debt, that being the proportion which Hartzheim ought to have paid as between himself and Yankey had he not been released. There must be a new trial as to Yankey, but his liability in no event can exceed one-half of the note. As to Hartzheim the judgment is affirmed, with costs, and as to Yankey it is reversed, with costs, and the action is remanded for a new trial.

BARDEEN, J., took no part.

BENSON v. PHIPPS. 1895.

87 Texas 578; 29 S. W. Rep. 1061.

Error to court of civil appeals of Fourth supreme judicial district.

Action by L. Phipps against H. L. Benson and others. From an affirmance (28 S. W. 359) by the court of civil appeals of a judgment for plaintiff, defendant Benson brings error. Reversed.

GAINES, C. J. The plaintiff was a surety for one Hosack, the principal maker upon a promissory note payable to the defendant in error. Some days after the note fell due Hosack wrote defendant in error requesting an extension, to which request the defendant replied, by letter, as follows: "I will extend the time of payment one year, and look with confidence for the accrued interest within 60 days, hoping it will not inconvenience you. After that, if it is your pleasure to make the interest on the extension payable semi-annually, it will help me." The defendant in error testified to having received the letter from Hosack, requesting an extension, and that the foregoing was his reply, but the contents of Hosack's communication were not otherwise shown. He also testified that he was paid nothing for the extension, and that Hosack never paid the accrued interest. Suit having been brought on the note by the payee against all the makers, the plaintiff in error pleaded his suretyship; and, the facts as stated above having been proved, the trial court gave judgment for the plaintiff in that court. That judgment, upon appeal, was affirmed by the court of civil appeals.

It is the right of the surety, at any time after the maturity of the debt, to pay it, and to proceed against the principal for indemnity. This right is impaired if the creditor enter into a valid contract with the principal for an extension of the time of payment. The obligation of the surety is strictly limited to the terms of his contract, and any valid agreement between the creditor and the principal, by which his position is changed for the worse, discharges his liability. For this reason it is universally held that a contract between the two, which is binding in law, by which the principal secures an extension of time, releases the surety, provided the surety has not become party to

the transaction by consenting thereto. If the creditor is not bound by his promise to extend, it is clear there is no release. In order to hold him bound by his promise, there must be a consideration. Whether a mere agreement for an extension by the debtor is sufficient to support a promise to extend by the creditor is a question upon which the authorities are not in accord. We are of opinion, however, that the question should be resolved in the affirmative, at least in cases in which it is contemplated by the contract that the debt should bear interest during the time for which it is extended. If the new agreement were that the debtor should pay, at the end of the period agreed upon for the extension, precisely the same sum which was due at the time the agreement was entered into, the case might be different. But a promise to do what one is not bound to do, or to forbear what one is not bound to forbear, is a good consideration for a contract. In case of a debt, which bears interest either by convention or by operation of law, when an extension for a definite period is agreed upon by the parties thereto, the contract is that the creditor will forbear suit during the time of the extension, and the debtor foregoes his right to pay the debt before the end of that time. The latter secures the benefit of the forbearance; the former secures an interest bearing investment for a definite period of time. One gives up his right to sue for a period, in consideration of a promise to pay interest during the whole of the time; the other relinquishes his right to pay during the same period, in consideration of the promise of forbearance. To the question why this is not a contract, we think no satisfactory answer can be given. It seems to us it would be a binding contract, even if the agreement were that the debt should be extended at a reduced rate of interest. That an agreement by the debtor and creditor for an extension for a definite time, the debt to bear interest at the same rate, or at an increased, but not usurious, rate, is binding upon both, is held in many cases, some of which we here cite: Wood v. Newkirk, 15 Ohio St. 295; Fowler v. Brooks, 13 N. H. 240; Davis v. Lane, 10 N. H. 156; Stallings v. Johnson, 27 Ga. 564; Robinson v. Miller, 2 Bush, 179; Reynolds v. Barnard, 36 Ill. App. 218; Chute v. Pattee, 37 Me. 102; Rees v. Berrington, 2 Ves. Jr. 540. See, also, Crossman v. Wohleben, 90 Ill. 537; McComb v. Kittridge, 14 Ohio, 348.

In many cases which seemingly support the contrary doctrine

there was a mere promise by the creditor to forbear, without any corresponding promise on part of the debtor not to pay during the time of the promised forbearance. In such cases it is clear that there is no consideration for the promise. In others, where there was a mutual agreement for the extension, it may be that interest during the period of extension was not allowed by law, and the agreement did not provide for the payment of interest. The case of McLemore v. Powell, 12 Wheat. 554, may have been of that character. In this case, as we construe the correspondence between Hosack and the defendant in error, there was a request for an extension of the debt for 12 months on part of the former, and an unconditional acceptance on part of the latter. We infer that Hosack must have written something about the payment of accrued interest,—probably that he hoped to be able to pay in 60 days. The presumption is that the letter was in the possession of the defendant in error at the time of the trial. He did not produce it. In any event, he should have known its contents, and, if Hosack made his request for an extension conditional upon his payment of the accrued interest, he should have testified to the fact. We conclude, therefore, that there was a binding promise for an extension, and that the plaintiff in error was therefore released. Upon a careful examination of our own Reports, we have found no decision of our court which is in conflict with the opinion herein expressed. There are a few cases which seem not to be in accord with our conclusions, but we think the conflict is only apparent. In Gibson v. Irby, 17 Tex. 173, the maker of the note sued on pleaded that the payee had promised him that the note should not be due and payable until the defendant had time to gather his crop, on condition that the defendant would then promptly pay the money and interest. The supreme court affirmed the ruling of the trial court in sustaining an exception to the plea, upon the ground that the plea showed no consideration for the promise. This ruling was correct, but if it had been pleaded affirmatively that the defendant had promised the payee that he would not claim the right to pay the debt before his crop was gathered we think the plea would have been good. In Claiborne v. Birge, 42 Tex. 98, Birge was the surety of one Urquhart upon three promissory notes, which fell due at different dates. After two of them had matured, Urquhart executed a written promise to the holder "to pay two per cent. per month interest on the

. . . . notes after maturity of the same." The evidence failed to show that the holder agreed to give an extension. It was held that Urquhart's promise was void, and that the surety was not released. There are some expressions in the opinion in that case which do not accord with our views, but which were not necessary to its decision. In Payne v. Powell, 14 Tex. 600, it is held that an agreement to extend, in consideration of a promise to pay usurious interest, is not binding upon the debtor, and therefore is not binding on the creditor, and that accordingly the surety was not released. On the other hand, it is determined in Knapp v. Mills, 20 Tex. 123, that an agreement to pay interest at an increased rate, which is not usurious, is sufficient to support a contract for an extension. There is error in the judgment, for which it must be reversed; and, since it may be shown upon another trial that Hosack's offer contained a condition that he would pay the interest in 60 days, the cause is remanded.

ROCKVILLE NAT. BANK v. HOLT. 1890.

58 Conn. 526; 20 Atl. Rep. 669; 18 Am. St. Rep. 293.

Appeal from superior court. Toll for county; Torrance, Judge.

ANDREWS, C. J. The L. B. Smith Rubber Company, a corporation doing business at Setauket, N. Y., being indebted to the defendant, gave him three promissory notes, and accepted three bills of exchange, representing such indebtedness and aggregating in the whole something more than $5,000. All of the notes and bills were payable to the order of the defendant, were by him indorsed, and at his request were discounted for his benefit by the plaintiff. Shortly thereafter the rubber company failed. That failure compelled the defendant to go into insolvency. The plaintiff presented its claim against his insolvent estate, and received a dividend thereon. The defendant having since that time acquired other property the plaintiff brought this suit and attached such other property. Since the bringing of this suit the plaintiff, in common with nearly all the creditors of the L. B. Smith Rubber Company, including the defendant, signed an agreement which is fully set out in the finding, but which

it is not necessary here to repeat. For the purposes of the present discussion it is sufficient to say that that agreement provided, among various other things, that the creditors of the rubber company should assign their claims to certain persons called "a reorganizing committee," and that this committee should proceed to reorganize the company and should issue to each of the several creditors in payment for their respective claims the stock of the reorganized company, which the creditors agreed to accept. When the plaintiff signed the agreement it added to its signature: "Reserving all rights against R. G. Holt, or against his estate, or assignee for the benefit of his creditors." These words did not appear in the body of the instrument. The defendant insists that by signing the agreement the plaintiff assigned all its claim against the L. B. Smith Rubber Company to the reorganizing committee, and that as he is liable to the plaintiff only as a surety for that company the assignment of the claim against the principal debtor discharges him. That an unqualified release of a principal debtor will be a discharge also of the surety is admittedly good law. The plaintiff, however, claims that by the reservation appended to its signature it is not affected by that rule. The defendant cites two cases, either of which by its terms fully supports his contention. But the authority of each of these cases is greatly weakened, if not entirely overturned, by later decisions in the same jurisdiction. Webb v. Hewitt, 3 Kay & J. 438, is substantially overruled by Green v. Wynn, L. R. 7 Eq. 31, and L. R. 4, Ch. 204; and Bank v. Blair, 44 Barb. 641, by Morgan v. Smith, 70 N. Y. 545; Calvo v. Davies, 73 N. Y. 211; Bank v. Bigler, 83 N. Y. 51, and Shutts v. Fingar, 100 N. Y. 539, 3 N. E. Rep. 588. It is stated in DeColyar on Principal & Surety, 418, that such a reservation as was made by the plaintiff prevents there being any discharge of the surety, and gives as authority Kearsley v. Cole, 16 Mees. & W. 128; Wyke v. Rogers, 1 De Gex, M. & G. 408; Boaler v. Mayor, 19 C. B. (N. S.) 76, 84; Owen v. Homan, 4 H. L. Cas. 997; and Close v. Close, 4 De Gex, M. & G. 176. See, also, Tobey v. Ellis, 114 Mass. 120; Kenworthy v. Sawyer, 125 Mass. 28; Bank v. Lineberger, 83 N. C. 454; Morse v. Huntington, 40 Vt. 493; Hagey v. Hill, 75 Pa. St. 108; Mueller v. Dobschuetz, 89 Ill. 176. The weight of authority seems to us to be strongly adverse to the defendant's claim.

There is another view of the case which makes it clear that the defendant is not entitled to a discharge by reason of the plaintiff's signing the agreement. Whenever a creditor gives time to, or makes a new contract with, the principal debtor, of which new contract the surety has knowledge and to which he assents, he is not thereby discharged. Adams v. Way, 32 Conn. 160; Corlies v. Estes, 31 Vt. 653; Smith v. Winter, 4 Mees. & W. 454. The composition agreement was beneficial to all the creditors of the L. B. Smith Rubber Company, provided all entered into it. The defendant and his trustee in insolvency signed it before the plaintiff did. It was obviously for the advantage of each that the other should sign. Without some such arrangement neither could ever hope for any payment from that company. With such an arrangement there was a chance that they might both be paid in full. The plaintiff signed with the knowledge that the defendant and his trustee had previously signed. A composition deed implies not only an agreement of the debtor with each of his creditors, but also an agreement by each creditor with each of the others. The signing of such deed by any creditor is in some measure a request to all the others to sign also. The circumstances of this case show pretty clearly that the defendant knew of and assented to the act of the plaintiff in signing the agreement. There is no error in the judgment complained of. The other judges concurred.

ROBERTS v. STEWART. 1856.

31 Miss. 664.

The error from the Circuit Court of Yazoo county. Hon. E. G. Henry, judge.

This was an action against a surety, to recover the amount of a promissory note executed by him and one Blackman, his principal, who has since died.

The defendant pleaded four pleas in bar of the action; the two first are sufficiently set out in the opinion of the court. The third plea averred that the defendant was surety of Blackman on the note sued on; "and that Blackman made several payments to plaintiff on account of the same; and plaintiff

finally agreed, if said Blackman would promise to increase the rate of interest on said note, or promise to pay a rate of interest greater than the legal rates of interest, that he, the said plaintiff, would extend the time of payment until December, 1853, which said increased rate of interest, he, said Blackman promised to pay; and said complainant, in consideration thereof, promised to give said extension of time, without the consent of defendant." The fourth plea was a plea of payment. The plaintiff demurred to the three first pleas, and the demurrer being sustained, the defendant declined to plead further. The cause was then submitted to a jury on the fourth plea and issue thereon, and the plaintiff had a verdict and judgment. The defendant sued out this writ of error.

HANDY, J., delivered the opinion of the court.

This was an action brought by the defendant in error to recover the money due on a promissory note made by the plaintiff in error, as surety for one Blackman, due twelve months after the 10th December, 1851, for $1,060.

The defendant below pleaded: First. That the plaintiff, on the 28th January, 1853, received from Blackman, on account of the note $300; and at the same time agreed, by a written memorandum, entered on the back of the note, to wait for the balance of the note until December thereafter, the agreement for an extension of the time of payment being made in consideration of the sum of money so paid; which agreement was made without the consent of the surety. Second. The second plea, in addition to the averments above stated, avers that Blackman, at the time of making the agreement, was solvent and able to pay the debt, but has since died insolvent. Third. That Blackman made several payments on account of the note, and that the plaintiff finally agreed that, if Blackman would promise to increase the interest, or promise to pay a rate of interest greater than the legal rate, he would extend the time of payment until December, 1853; and that Blackman promised to pay the increased rate of interest, and in consideration thereof, the plaintiff promised to give the extension of time, without the consent of the surety.

To these pleas, the plaintiff demurred, and the demurrer was sustained, and judgment rendered for the plaintiff; and thereupon this writ of error is prosecuted.

The only questions for consideration are those arising upon the sufficiency of the pleas.

Upon the first and second pleas, two points are raised. First. Whether a mere gratuitous promise by a creditor to a principal debtor to forbear suit for any stated time, if carried out, will discharge a surety. Second. Whether an agreement by the creditor with the principal, in consideration of the payment of a part of the debt after it has become due, that he will extend the time of payment to a future stipulated period without the consent of the surety, will discharge him.

The first proposition cannot be the subject of any doubt, and we are aware of no case in which it has been held that a surety would be discharged under such circumstances. All the authorities hold, that in order to discharge the surety, there must be a binding contract between the creditor and the principal, founded on a valuable legal consideration, by which the creditor is precluded from suing upon the contract according to its original terms; and if there be no such consideration, the agreement cannot be said to be obligatory, and the creditor may, in point of law, disregard it and bring his suit at any time. Whatever might be the force of such an agreement, in point of good faith or morals, it certainly wants that indispensable requisite of a contract, a valid legal consideration.

And for the same reason, the surety will not be discharged under the circumstances of the second proposition. For the contract for forbearance cannot be valid as such, unless it be founded on a new consideration, independent of that of the original contract, upon some benefit received or secured to the creditor which the principal was not bound to render under the original contract, such as the payment of interest, or a part of the debt before it was due, the giving of additional security or the like, as a consideration for further indulgence. But a partial payment, made after the debt has become due, cannot be a new and independent consideration. It is merely paying a part of what the debtor was already bound to pay in full. No benefit is received by the creditor, but what he was entitled to under the original contract, and the debtor has parted with nothing but what he was already bound to pay. It cannot therefore with any propriety be said that such partial payment would be a sufficient legal consideration to render the promise of further indulgence a binding contract, debarring the creditor of the legal right of suing upon the original contract, regardless of such agreement. Montgomery v. Dillingham, 3 S. & M. 647; Newell v. Hamer, 4 How. 684.

The case of Rupert v. Grant, 6 S. & M. 433, is relied upon as conflicting with this view of the subject. But the point of the sufficiency of the consideration, founded on a partial payment of a debt due, does not appear to have been specially considered in that case; and it is manifest that the rule contended to be there sanctioned cannot be sustained upon principle or authority, consequently we cannot give it our sanction.

The third plea was insufficient upon several grounds. First. It does not show what rate of increased interest Blackman agreed to pay in consideration of the indulgence, or, whether it was paid or secured to be paid, so as to give the creditor the benefit of it. Second. If it was not paid, as must be presumed from the substance of the plea, and was secured to be paid, by note or otherwise, that contract was void for usury; and an agreement to give time, founded on such consideration, will not be binding on the creditor, because it is not legally obligatory upon the debtor, and will not discharge the surety. Tudor v. Goodloe, 1 B. Monroe, 322; Anderson v. Mannon, 7 Ib. 217; Duncan v. Reid, 8 Ib. 382; Vilas v. Pusey, 1 Comstock, 274; Pyle v. Bestock, 10 Ala. 589.

Let the judgment be affirmed.

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c. An extension of time procured by the fraud of the principal will not relieve the surety because it is not binding on the creditor.

ALLEN v. SHARPE. 1871.

37 Ind. 67; 10 Am. Rep. 80.

Suit by the appellees against the appellant, on a promissory note, payable in bank made by Layton Mills, payable to Moses Allen and indorsed by him to the appellees. The further facts stated in the complaint are, that when the note matured, Mills brought to the plaintiffs at their bank another note for a like sum, made by him and payable to the order of said Allen, thirty days after date, and upon the same terms as said first note, which then and there had upon the back of it what purported to be, and Mills represented to be, the indorsement of said Allen; that upon the faith that said indorsement was genuine and authorized, the

plaintiffs surrendered to Mills the first note, and took in lieu of it the last-named note; that the indorsement was forged, and Allen refuses to recognize the same; that said first-named note remains unpaid and is in the hands of defendant or of the representatives of Mills, who is dead; that at the time the second note was substituted for the first, Mills was insolvent, and the same was received solely upon the faith that the defendant, who was solvent, had indorsed the same, etc.

The defendant demurred to the complaint, and his demurrer was overruled. He then answered, stating in addition to the facts disclosed in the complaint, that he indorsed the note for the accommodation of Mills, who got the money on the same, which was known to the plaintiffs; that the last note was received by the plaintiffs in satisfaction of the note in suit, without the knowledge or consent of the defendant; that he did not know for fifteen days that the note sued on was claimed by the plaintiffs as not paid, but during that time he supposed it had been paid by Mills, and he avers the fact to be that it was paid and satisfied as aforesaid; that at the time of the acceptance of the second note, the plaintiffs canceled and surrendered up to Mills the first note; wherefore, etc.

The plaintiffs demurred to this answer, because it did not state facts sufficient to constitute a defense, and their demurrer was sustained. The defendant excepted.

Downey, J. (after stating the above facts). The point presented by the assignment of errors, which calls in question the correctness of the decisions of the court in overruling the demurrer to the complaint and in sustaining the demurrer to the answer, is this: Were the delivery by Mills to the plaintiffs of the second note, with the name of Allen forged thereon, Mills representing it as genuine, and its acceptance by the plaintiffs as payment of the note on which the action is predicated, Mills being then insolvent, and the plaintiffs relying exclusively on the liability and solvency of Allen, a good defense to the action?

We think that neither upon reason nor authority can these facts be held to be a satisfaction of the note on which the action is predicated.

The alleged satisfaction was not made by Allen. He, however, sets up what was done by Mills as amounting to a satisfaction. He ratifies and approves what was done by Mills, and claims that it discharged the note. Like a principal who ratifies an unau-

thorized act of his agent, he seeks to give it effect, and make it operative, and to claim the benefit of the act. If he would ratify and adopt the act of Mills he must adopt it in whole. He must be held as making Mills his agent, and as adopting all the parts and attending circumstances of the transaction. He cannot present and rely upon such part or parts of the transaction as are favorable to him, and reject the residue. While he adopts and relies upon the delivery of the second note by Mills, as a satisfaction of the note in suit, he must also adopt, ratify, and make his own the falsehood and fraud of Mills, in representing the indorsement upon the second note as genuine, which must have the effect of taking away from the transaction every semblance of a satisfaction. The appellees did not agree to accept a note on which Mills alone was liable, and he insolvent. What they contracted for was a note on which Mills was liable as maker and Allen as indorser. This they did not get, and they are, consequently, not bound by the promise to take the worthless note, and surrender up their right of action upon the first note. Allen, having refused to recognize or admit any liability on the second note, cannot set up the giving of it by Mills as a bar to a recovery on the first one. It seems to be supposed, however, that Allen had some ground to complain, because "he did not know for fifteen days that the note sued on was claimed by the plaintiffs as not paid, but during that time he supposed it had been paid by Mills." What harm was done him, or what damage accrued to him from this ignorance? Mills was insolvent. If Mills had been solvent, and by the lapse of time Allen had lost an opportunity to save himself from loss as his indorser, there would have been some reason for urging this point. But without such a showing the argument is destitute of force.

In Bell v. Buckley, 11 Exch. 631, the action was upon a bill of exchange. There was a plea of payment, and issue thereon. The evidence on the trial disclosed the facts to be that the alleged payment consisted in the delivery to the plaintiff of another bill of the same parties, as appeared, but on which the acceptance was forged. The bill was in that case, as the note was in this, accommodation paper. There the principal in the transaction had become bankrupt, and absconded. Here the principal had become insolvent. It was submitted, in that case, on the part of the plaintiff that the facts did not amount to a payment of the bill. The learned judge was of that opinion, and a verdict was

entered for the plaintiff for the amount of the bill and interest, leave being reserved to the defendants to move to enter a verdict for them. Upon a rule *nisi*, after a full discussion of the question, ALDERSON, B. said: "The rule must be discharged. The only question is, whether the defendant has made out that this bill was paid by Thornley. It appears that the day before the bill became due, Thornley came to the bank, and, there being another bill of his due that day, he requested the manager to 'retire' those bills by discounting two other bills which he brought with him. The manager consented, and for the purpose of retiring the bill for which this action is brought, Thornley gave to the manager a bill for the same amount, and apparently between the same parties, the present defendant being supposed to be the acceptor. It turned out, however, that it was a bill upon which no action could be maintained against the defendant, since the acceptance was a forgery. The transaction is simply this: The bank take up the bills, and charge in account with Thornley the amount which the discount would have been if it had been discounted by a third person, and they give him credit for the amount of the forged bill, minus the discount. That is not payment of the other bill. Then it is suggested, on the authority of Clayton's Case, that inasmuch as Thornley paid moneys into the bank after the bill was due, they must be taken as paid in discharge of that bill. But where there is an account on the one side of sums owing, and on the other of sums paid, there is no presumption that the items of payment are in respect of the items owing; it depends on the fact of actual appropriation."

PLATT, B., said: "I am of the same opinion. In order to retire the other bill, the bank discount the forged bill, and give Thornley credit for the amount, minus the discount. That is no payment of the former bill, but a mere substitution of one bill for another, for the purpose of giving the debtor an ulterior day of payment."

MARINT, B., said: "I am of the same opinion. The case, when understood, is perfectly plain. It is an action against the acceptor of a bill of exchange; the plea states that it was accepted for the accommodation of Thornley, and it goes on to allege that Thornley paid the amount. The defendant must, therefore, establish that fact. Then, what is payment of a bill? It is argued that the delivery of one bill to 'retire' another is payment; in one sense it may be, but the meaning of payment in this plea is

an equivalent amount of money given by the debtor to the creditor in satisfaction of his claim on the bill. Then what are the facts? The day before the bill becomes due, Thornley goes to the manager of the bank, and induces him to take up the bill, by giving him another bill which turns out to have a forged acceptance. That is no payment. Suppose Thornley had said to the manager of the bank: 'A. B. owes me a sum of money, and here is a document by which he admits the debt; take it and get the money, and pay the bill which you hold of mine;' that the manager assented, but, on going to A. B., found that the document was a forgery, could it for one moment be contended that there was any payment of the bill? That, however, is this identical case, the only difference being, that here the manager of the bank agreed to accept a document not payable immediately, but at the expiration of three months. Then it is said that the case is one of hardship on the defendant, who is a mere surety; but assuming that the plaintiff was bound to consider him other than the principal debtor, even if this had been an action not upon the bill itself, but against him as a surety, I think that he would have had no defense. It is also said that it is a case of hardship, because the defendant, not having been called upon, would naturally suppose the bill was paid. But a person being under the idea that a bill is discharged, when it is not in fact discharged, nevertheless remains liable. According to my view of the case, there is not a scintilla of evidence of payment of the bill, in the sense in which that term is used in the plea; the entries in the bank books are nothing more than a mode of keeping the accounts by debits and credits."

In Wait v. Brewster, 31 Vt. 516, the court, in discussing what amounts to satisfaction of a note, say: "Ordinarily, a note given for a previous debt is *prima facie* payment of such debt. The law supposes that the parties intended to extinguish the old debt and leave no right of action except upon the note." "But," say the court, "if the parties stipulate that the note shall not have that operation, then their agreement governs, and the antecedent cause of action still subsists. Other limitations of the general doctrine will appear from an examination of the authorities above cited. Thus it has been held that when the party takes the note under a misapprehension as to facts, he supposing that other parties are bound by it who are not, then the intention of treating

it as payment is rebutted, and the party may sue upon the original debt."

We are referred by counsel for appellant to The Pres., etc., of the Gloucester Bank v. The Pres., etc., of the Salem Bank, 17 Mass. 33, where it was held, that "where a banking company paid notes, on which the name of the president had been forged, and neglected for fifteen days to return them, it was held that they had lost their remedy against the person from whom the notes had been received." This case is wholly unlike the one under consideration. There the party who presented to the bank the forged bills was an innocent party, and it was important to him to have the bills returned at once, if they were not genuine, so that he might return them to the party from whom they had been received. And in addition to these facts, the forged signature was that of the president of the bank which received and paid the bills, and must be presumed to have known immediately of the spurious character of the bills.

We are also referred to Coggill v. The American Exchange Bank, 1 N. Y. 113, but have been unable to see its force as an authority in the case under consideration.

Professor Parsons, in his work on notes and bills, is cited by appellant. He says: "As money paid under a mistake of fact may always be recovered back, one who pays money on forged paper, by discounting or cashing it, for example, can always recover it back, provided he has not contributed to the mistake himself, materially, by his own fault or negligence, and provided that, by an immediate or sufficiently early notice, he has enabled the party to whom he paid it to indemnify himself as far as possible." 2 Pars. Notes and Bills, 597. Why can he recover it back? Simply because there was no consideration for its payment. He supposed he was getting a valid and genuine instrument, when, instead, he got a forged and worthless piece of paper. Suppose, instead of having paid money for the forged paper, he had given up a note or bill which he held, would there be any consideration for that act? Would he be bound to lose his right of action any more than he would be bound to lose the money which he had paid for the forged paper? Surely not.

We are satisfied that there is no error in the record in this case.

Judgment affirmed, with costs.

McDOUGALL v. WALLING. 1896.

15 Wash. 78; 45 Pac. Rep. 668; 55 Am. St. Rep. 871.

Appeal from superior court, Snohomish county; JOHN C. DENNEY, Judge.

Action by Malcolm McDougall against N. D. Walling and William G. Swalwell. From a judgment dismissing the action as to defendant, Swalwell, plaintiff appeals. Reversed.

GORDON, J. Appellant, McDougall, brought this action in the superior court of Snohomish county upon a promissory note executed by N. D. Walling and William G. Swalwell, payable to the order of Walling, dated April 24, 1893, and payable 90 days thereafter; said note being for the sum of $2,800, and interest at the rate of 12 per cent. per annum from date until paid. The defendant, Walling, made default. Respondent, Swalwell, answered that he executed the note solely for the accommodation of Walling, and was a surety only, all of which was known to plaintiff at the time of the indorsement and delivery of said note to him by Walling; that, after the maturity of the note, appellant entered into a definite agreement with the defendant, Walling, whereby the time of payment of said note was extended, and that the agreement to extend was made without the consent of the respondent, and released him from the payment thereof. The appellant replied, denying all of the affirmative matter set out in the answer, and, the cause having been tried before a jury, a verdict was returned in favor of Swalwell. Thereafter, appellant's motion for a new trial was denied, judgment entered dismissing the action as to Swalwell, and the cause appealed.

The undisputed testimony in the case shows that, shortly after the execution of the note, Walling sold the same to the appellant, and that, prior to becoming the owner thereof, appellant had no conversation whatever with respondent, Swalwell. At the time of its maturity, or within a few days thereafter, Walling requested an extension. It further appears that the sum of $200 was paid by him at that time to the appellant, for the purpose, as testified by Walling, of paying the interest then due on the note, amounting to about $75, and the balance as consideration for an extension of the note for a period of 30 days, or until August 24, 1893. The appellant, in his testimony, admitted the receipt from Walling of $200 for the purpose of paying the interest then due

upon the note, and the remainder as consideration for his agreeing to postpone suit on the note until August 24, 1893. He further testified that this arrangement was entered into upon the representation of Walling that he came with instructions from Swalwell to get the time extended; that he, Swalwell, was a banker at Everett; that "it was panicky times, and he could not draw the money . . . . out of the bank. . . . He pleaded very hard for Mr. Swalwell's credit," and "I finally consented that I would not start an action for a certain length of time. . . He stated most distinctly that he came down with Mr. Swalwell's sanction and consent." Counsel for the respondent, Swalwell, objected to the introduction of any testimony as to what Walling said to appellant, because not made in the presence of Swalwell, etc., and the lower court thereupon held that said statements were not competent as against Swalwell; adding: "I will allow him to state what was said there, but will cover it with instructions to the jury afterwards;" and thereafter the court charged the jury in respect thereto as follows: "You are further instructed that when it is sought to bind the defendant by statements made by a third party, not in the presence of the defendant sought to be charged, it must be shown, not only that such statements were so made, but it must be further shown that such third party was authorized to make such statements by the party sought to be charged." To this ruling, and the giving of the instruction set out, appellant excepted, and has assigned the same as error.

We think that the testimony was competent, and should have been permitted to go to the jury. An agreement between a principal debtor and the holder of a note, to extend the time of payment for a definite period after maturity, in order to release the surety, must be such an agreement as the principal debtor could himself enforce. The representation by Walling (assuming that it was made), that Swalwell requested and consented to the extension which was sought became material, because, assuming that Swalwell was a surety merely, the representation, if false in fact, was fraudulent means employed in obtaining it. If, on the other hand, the representation was made by Walling upon authority from Swalwell, or if Swalwell subsequently consented to the extension so obtained, he would not be released, assuming that he was a surety only, and that appellant had knowledge of that fact.

The question here presented was involved in Bangs v. Strong, 10 Paige, 11. It was there held that where an "agreement is obtained from the creditor by a principal debtor upon the false representation of the latter that the surety had authorized him to make it, and the surety afterwards refuses to assent to the agreement, the creditor will be at liberty to repudiate it. . . ."

It is further insisted by appellant that the evidence was insufficient to justify the verdict. We think, however, that, upon the material issues, the testimony was sufficiently conflicting to require its submission to the jury under proper instructions. As the cause must be retried, however, we deem it proper to say that instructions Nos. 8 and 9, which were excepted to by appellant, should not, in our opinion, have been given. They are incomplete, and, in a measure, inconsistent with instructions 1-3, given by the court, which correctly stated the law. Whether the giving of these instructions constituted such error as would require a reversal of the cause, we are not called upon to determine.

As a new trial must be had, we think that, in order to fully determine the rights of parties, special findings should be required of the jury, as provided in section 375, 2 Hill's Code; and, if the jury find that respondent, Swalwell, was merely surety for Walling, and that appellant knew of that fact at or prior to the time of the purported extension, then they should be required to find whether such extension was secured wholly or in part by means of Walling's falsely representing that Swalwell consented thereto; and, if the jury shall find that such representations were made, then the appellant would be entitled to recover the amount of the note, with interest from July 23, 1893, less the sum of $125, withheld as bonus or consideration for the extension granted which last mentioned sum it would be the right of the respondent to have treated as a partial payment upon the note.

Reversed and remanded.

SCOTT, DUNGER, and ANDERS, JJ., concur. HOYT, C. J., concurs in the result.

d. An agreement to extend time of payment in consideration of a part payment of a debt already due is void for want of consideration and will not release the surety.

OBERNDORF v. UNION BANK. 1869.

31 Md. 126; 1 Am. Rep. 51.

Appeal from the superior court of Baltimore city.

In 1860 the firm of Stettheimer & Affelder assigned to the appellee certain collaterals to secure any liability then existing or to arise thereafter, with full power to the assignee to collect or compromise such collaterals if said firm made default, and apply the proceeds upon the firm's liability. In 1862 the firm failed, and in October of that year made a deed of trust of all their property to the appellant for the benefit of their creditors; at that time the appellee had on hand a portion of the said collaterals, among which was a note of Weiller Brothers & Co., which had matured January 11, 1862, and was in 1865 compromised by the appellee with them for fifty cents on the dollar.

A part of the liability of the first named firm to the appellees consisted of certain notes amounting to $3,186.42, drawn by Steiner Brothers & Co., and discounted for said firm of S. & A. by the appellees. These notes were compromised with said Steiner Brothers in 1865, for fifty cents on the dollar. One other note, drawn by A. Heilbrun, and discounted for said firm, was also settled for fifty cents on the dollar.

The appellee had also discounted for Frick, Phillips & Co., a note of S. & A., to the payment of which it applied money realized from the collaterals. The appellee collected enough to pay the liabilities of the firm of S. & A. to it in full, and in 1866 delivered to the appellant the remainder of the collaterals which were not collected.

The opinion sufficiently shows the questions at issue.

Alvey, J., delivered the opinion of the court.

There is no doubt of the general proposition, that if the creditor release or compound with the principal debtor, without the consent of the surety, although the principal debtor may be in insolvent circumstances, and the arrangement with him be, in truth, to the surety's advantage, it will nevertheless discharge the latter from all responsibility. The question whether the surety has been, in point of fact, actually damnified by such dealing

with the principal debtor is not open to inquiry. It is his right to determine for himself what is, or is not, for his benefit. He must be left free to consider whether he will have recourse to his remedy against his principal or not; and if, by any act of the creditor, this right be taken from him, the law allows him to elect to consider himself discharged from the contract altogether. "For it is," says Lord Loughborough, in the leading case of Rees v. Berrington, 2 Ves. Jr. 540, "the clearest and most evident equity not to carry out any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement."

But, while such is the rule, before a surety or indorser can be exonerated from his responsibility upon the ground that there has been an unauthorized indulgence given, or composition made with, the principal debtor, it must be shown that such indulgence or composition has been effected by some express agreement, founded upon a valid consideration, and which is legally binding on the creditor. Without sufficient consideration, the agreement would be a nullity, and consequently would bind no one. And the first question in this case is, whether the compromises and settlements made by the bank with Steiner Brothers & Co., and with Heilbrun, whereby fifty cents on the dollar were received on the notes discounted for Stettheimer & Affelder, had in them the elements of binding contract, and such as could be enforced by the parties either as a defense or as a cause of action; for if not, Stettheimer & Affelder remained bound as indorsers, notwithstanding the arrangement made by the bank with the makers of the notes.

There is no principle better established than that part payment of the amount due, whether by principal or surety, will not discharge the surety, even where it is agreed that such part payment shall have that effect; for the surety being equally bound with the principal for the payment of the whole, neither can be discharged upon the payment of less than the whole, except it be by some agreement founded upon a valid and sufficient consideration. Where a party is bound to pay a certain sum, there is no consideration in contemplation of law for a promise that a less sum shall be received in satisfaction. Geiser v. Kershner, 4

Gill & Johns. 305; Fitch v. Sutton, 5 East, 230; Wilkinson v. Byers, 1 A. & F. 106; Cotton v. Godwin, 7 M. & Wels. 147; Lincoln v. Bassett, 23 Pick. 154.

In this case the notes, at the time when the compromises were made, were overdue, and it does not appear that there was any legal consideration whatever for the relinquishment, on the part of the bank, of the balance due on them, after the receipt of one-half their face value. There was no deed of composition with creditors, nor any release under seal given by the bank which would have imported consideration. And in the absence of some sufficient consideration, such an agreement as that proved on the part of the appellant, and set out in his prayers, made merely by parol, is wholly inoperative, and cannot be set up or relied on by the makers of the notes, either as against the bank or the indorsers. The notes have never in fact been surrendered to the makers, and the bank was not bound to any active diligence in their collection, in order to give it the benefit of the collaterals deposited with it by the indorsers.

This view of the case disposes of the first, second and third prayers of the appellant.

His fourth prayer we understand to be abandoned. It might well be so, because the note therein referred to was clearly within the terms of the contract of the 16th of May, 1860, and the bank was well warranted in applying the proceeds of the collateral securities to its payment.

As to the fifth and sixth prayers of the appellant, relating to the bank's holding and dealing with the collateral securities, after full payment of its claim on account of discounts, they were properly granted. For any loss or injury sustained by reason of misapplication of the collaterals by the bank, or its failure to account after applying in good faith a sufficient amount of such collaterals to pay its claims against Stettheimer & Affelder, the appellant was certainly entitled to recover. And while these prayers secured to the appellant the full benefit of that inquiry before the jury, it is no objection to them, that can be taken by the appellant, that they were granted in connection with objectionable prayers offered by the appellant and modified by the court, and which opened a wider scope of inquiry for the appellant's benefit.

The court below is right in granting the appellee's first prayer, as being the converse of the appellant's fourth, which was not maintainable, as we have seen.

The appellee's second prayer, however, should have been refused, though, in the view we have of this case, the granting of it was by no means prejudicial to the appellant; but, on the contrary, was a concession to him of ground of recovery, which he was not entitled to occupy before the jury. The action of the court, therefore, in granting this prayer, is no cause for reversal.

And as to the third and fourth prayers of the appellee, we think it clear that the court was right in granting them both. The appellee had express authority to compromise with parties indebted on the collateral securities, and we have said that agreements, such as that stated in the fourth prayer, were inoperative for want of sufficient legal consideration.

Judgment affirmed.

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e. In order that an extension in time of payment should work a release of the surety the relation of the surety to the debt must have been known to the creditor at time of extension.

MULLENDORE v. WERTZ. 1881.

75 Ind. 431; 39 Am. Rep. 155.

Action on a promissory note. The opinion states the case. The plaintiff had judgment below.

MORRIS, C. This suit was brought upon the following promissory note:

"February 14, 1877.

"One year after date we promise to pay John Wertz, or order, eight hundred dollars and eighty cents, with interest at ten per cent. per annum after maturity, and with attorneys' fees, value received, and without any relief whatever from valuation and appraisement laws.

"$800.80. CLINTON MULLENDORE.
GEORGE MULLENDORE."

Clinton Mullendore made default. George Mullendore answered the complaint in four paragraphs. The first was the general denial, which was afterward withdrawn.

The second paragraph admits the execution of the note, but avers that George Mullendore executed it as the surety of Clinton Mullendore, which fact was known to the appellee; that after-

ward, with such knowledge and without the pleader's consent or knowledge, the appellee agreed with Clinton Mullendore, for a sufficient consideration, to extend the time for the payment of said note for the period of four months from the time of its maturity; that by this agreement he had been released and discharged from liability on said note.

The third and fourth paragraphs of the answer were, in substance, the same as the second.

The appellee demurred separately to each paragraph of the answer. The demurrer was overruled. He then replied to the answer in four paragraphs, the last being a general denial. The appellant, George Mullendore, demurred to the first, second and third paragraphs of the reply. The demurrers were overruled. The cause was submitted to a jury, who returned a verdict for the appellee. The appellant, George Mullendore, moved the court for a new trial, which was overruled, and judgment was rendered upon the verdict.

The rulings of the court upon the several demurrers to the reply, and upon the motion for a new trial, are assigned as errors. George Mullendore alone appeals.

The first paragraph of the reply admits, that on the 2d day of February, 1878, in consideration of $26.33, paid to the appellee by Clinton Mullendore, being the interest in advance on the note for four months, he agreed to extend the time for the payment of the note for four months, as stated in the appellant's answer, but it was also averred that at the time of making said agreement the appellee had no knowledge of the fact that the appellant, George Mullendore, was or claimed to be the surety of Clinton Mullendore on said note, as stated in said answer.

The question raised by the demurrer to this paragraph of the reply is, "does an agreement made between the payee and one of two joint makers of a note, without the knowledge or consent of the other, who is in fact the surety of his co-maker, have the effect to release the non-consenting joint maker from his liability, though the payee of the note was, at the time of making the agreement, ignorant of the fact that he was such surety." If this proposition is to be answered in the affirmative, as the appellant insists it should be, the reply is bad, and the demurrer should have been sustained; if in the negative, the reply is sufficient and the demurrer was rightly overruled.

The appellant insists upon the following propositions:

First. That the verbal contract set up in the answer, and admitted by the reply, changed the contract evidenced by the note in a material part.

Second. That one of two joint co-obligors is not authorized, without the consent of the other, to change the joint contract in any respect; and if he does, by a valid agreement, so change the contract, the non-consenting obligor is discharged.

The agreement alleged to have been made for the extension of the time for the payment of the note in suit is averred to have been made between the appellee and Clinton Mullendore. The consideration for the alleged extension was paid by Clinton Mullendore, not by George Mullendore, nor by them jointly, but by Clinton alone. George Mullendore was not a party to the contract. The contract should therefore be construed as the agreement and promises of the parties who entered into it; and for any violation of the terms of the agreement or any promise or covenant contained in it, the offending party would be personally liable to the injured party, and to him alone. The agreement of the appellee must be construed as made for the benefit of Clinton Mullendore alone, and in case of its breach he alone would have the right to sue the appellee and recover such damages as he might have sustained.

In the case of Draper v. Weld, 13 Gray, 580, the court say: "If as between McGregory and Stevens, they were co-sureties of Weld, the giving of time to one of them did not discharge the other, because the mere giving of time to one of two obligors, whose obligations are equal, will not discharge the other. Dunn v. Slee, Holt, N. P. 399, and 1 Moore, 2; Burge on Suretyship, 156. Giving time by oral agreement to McGregory can not have any greater legal effect than a covenant by a creditor not to sue, for a specified time, one of two or more joint debtors. Such a covenant is not a release, and it furnishes no defense to the other debtors. Lacy v. Kynaston, 12 Mod. 548; Dean v. Newhall, 8 T. R. 168; Shed v. Peirce, 17 Mass. 623; Wilson v. Foot, 11 Met. 285." The verbal agreement can not, we think, be held to have discharged George Mullendore on the ground that it changed the contract evidenced by the note in a material part.

In case of Wilson v. Foot, *supra,* it is held that where a note is signed by several parties, though part of them are in fact sureties for the others, yet if that does not appear upon the face of the note, the payee does not discharge the sureties by giving time to

the principal debtor, unless he had knowledge, at the time of so doing, that the other makers were sureties; and that such knowledge is not to be presumed in favor of the sureties, but must be proved; that a covenant not to sue one or more joint makers of a note does not discharge or release the others, it being regarded as a mere personal covenant. 2 Dan. Neg. inst., 289. There are many decisions of this court in full agreement with the above cases. McCloskey v. Indianapolis, etc.; Union, 67 Ind. 86; s. c., 33 Am. Rep. 76; Davenport v. King, 63 Ind. 64; Huff v. Cole, 45 id. 300.

In the case of Davenport v. King, *supra,* the court, quoting from Neel v. Harding, 2 Met. (Ky.), 247, says: "If they were all principals, an agreement with one of them to give further day of payment would not operate to release or exonerate the others. Such an agreement cannot be allowed to have any more effect than it would have had if the promisors were all actually, as they all appear to be, principals in the note, unless the holder, at the time he entered into the agreement, had notice that the parties who claimed to be sureties did occupy that attitude on the paper."

In some of the paragraphs of the answer, the agreement to extend the time of payment is alleged to have been made before the maturity of the note. This can make no difference. The agreement was the agreement only of the parties to it. The note still remains in full force, unaffected by the agreement for the extension of the time of payment. We have examined the authorities referred to by the appellant's counsel, and think them not opposed to the conclusion which we have reached.

In the case of Hall v. Hall, 34 Ind. 314, the Halls borrowed $100, and each was to have $50. This fact distinguishes that from the case now before us. In the case of Crafts v. Mott, 4 N. Y. 603, the land, for the purchase of which the instrument was given, was equally divided between the purchasers, and this was held to operate as a division of the debt. Each of the makers was regarded as principal debtor for one-half of the land purchased, and surety as to the other half.

In the case of Cheetham v. Ward, 1 B. & P. 630, one of the joint obligors had been appointed executor of the obligee, and thereby discharged. This was held to discharge the other obligor. In the case of Rees v. Berrington, 2 Ves. Jr. 540, it was held that where the creditor, without the consent of the known

surety, gave further time to the principal, the surety was discharged. None of these cases is irreconcilable with the cases to which we have referred in support of our conclusion. The court did not err in overruling the demurrer to the first paragraphs of the reply.

(Omitting other questions.)

It is ordered, upon the foregoing opinion, that the judgment below be in all things affirmed, at the costs of the appellant.

Order affirmed.

LEITHAUSER v. BAUMEISTER. 1891.

47 Minn. 151; 49 N. W. Rep. 660; 28 Am. St. Rep. 336.

Appeal from municipal court of St. Paul, Cory, Judge.

Action by Matt Leithauser against William Baumeister and others. Judgment for plaintiff. Defendants appeal. Reversed.

DICKINSON, J. Prior to November 30, 1887, the three defendants were copartners, engaged in business under the name of John Comes & Co., and as such copartners they were indebted to a partnership firm (Matt Leithauser & Co.), to whose rights the plaintiff has succeeded in the sum of $280. The partnership was dissolved at time above stated. This action is to recover on that indebtedness. The defendants, Nagler and Baumeister, plead in defense that, by a contract between the defendants at the time of the dissolution, Comes became obligated to pay this debt; that after the dissolution Comes formed another partnership with one Schneider, under the same partnership name as that of the former firm, John Comes & Co., all of which, as is alleged, was known to the plaintiff; and that he accepted from Comes a promissory note of the new firm, signed in its partnership name, payable 90 days thereafter, in satisfaction of the indebtedness of the defendants. The court found in general terms that, except as to the allegation of the dissolution of the defendants' partnership, the allegations of the answer were not proved. This finding was erroneous in some particulars, and it cannot be said that the erroneous conclusion may not have affected the decision of the case. The evidence conclusively showed, and without dispute, not only that the partnership of the defendants had been dissolved when (as the fact is admitted

to have been) the plaintiff in February, 1888, took from Comes a note, signed in the partnership name of that firm, for the amount of the debt, payable 90 days after date, with interest at the rate of 8 per cent. per annum, but that a settlement had been made between the copartners, and an agreement entered into which, as between themselves, obligated Comes to pay this partnership debt to the plaintiff. Moreover, the evidence on the part of the defendants (appellants) went to show that the plaintiff had been informed of this fact, and this is not really controverted in the evidence on the part of the plaintiff. On the contrary, he admits in his testimony that he "knew of the settlement they had," but did not know of the dissolution of the partnership. He admits that "Comes gave the note in the partnership name, because he said he did not want to stand by his agreement with the other parties because they did not stand by theirs. . . . He did not want to pay this claim all by himself, because they didn't live up to their agreement." We think that the case showed, contrary to the finding of the court, both that Comes had assumed the obligation, as respects the other defendants, of paying this debt, and that the plaintiff was informed of it when he took from Comes the note, in form expressing the obligation of the partnership, payable at a future day, at a rate of interest in excess of what the law would allow in the absence of express agreement. These facts are material. While such an agreement between the joint debtors, to which the plaintiff was not a party, could not prejudice him or affect his right of action against them all, yet it would affect the rights of the parties growing out of any new contract which he, having knowledge of such agreement between the defendants, might thereafter make with one of them. When Comes took upon himself the legal obligation of the defendants to pay this debt, they occupied towards him the position of sureties; and the creditor, knowing the fact, should not be allowed to make a new contract extending the time for payment, without their consent. Millerd v. Thorn, 56 N. Y. 402; Smith v. Shelden, 35 Mich. 42; Oakeley v. Pasheller, 10 Bligh, (N. S.) 548, 589. If the plaintiff knew that Comes had thus assumed the payment of this debt, he must be deemed to have known that the mere general partnership relation which he may have supposed to be still existing did not authorize Comes to give the note of the partnership for a debt which it had become his own personal obligation to pay. While the note,

taken under those circumstances, would not be obligatory on the other defendants, it would be enforceable against Comes, and would be effectual, as between the plaintiff and Comes, as a new contract, to extend the time for the payment of the debt (Wheaton v. Wheeler, 27 Minn. 464, 8 N. W. Rep. 599); and that would release the other defendants (see authorities above cited), even though there be no proof as to what, if any, injury the sureties may have suffered (Rees v. Berrington, 2 Ves. Jr. 540; Miller v. McCan, 7 Paige, 451; Calvo v. Davies, 73 N. Y. 211, 216). It may be that if the plaintiff had not known of the agreement between the defendants, and if he could be deemed to have supposed that the note was rightfully given as the note of the partnership, the result would have been different. Agnew v. Merritt, 10 Minn. 308 (Gil. 242). The finding of the court being, as we consider, erroneous in the particulars above stated, a new trial must be granted. We observe a variance between the proof and the answer, in that the note given appears to have been intended to express the obligation of the defendants' former partnership, and not, as alleged, the obligation of a new partnership, of which Comes and Schneider were members. There was no evidence of the existence of any such partnership. It is not claimed that this variance is material, and probably it was not. It is only adverted to here so that any doubt concerning it may be avoided if thought necessary.

Order reversed.

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f. Property of one person pledged for the payment of the debt of another stands in the relation of surety with all the rights of a surety.

POST v. LOSEY. 1887.

111 Ind. 75; 60 Am. Rep. 677.

Action on a note. The opinion states the facts. The defendant had judgment below.

Zollars, C. J. On the 2d day of September, 1875, Robert C. Losey, for his own use and benefit, borrowed of appellant's decedent, Jacob Hubner, a sum of money to be repaid in three years.

As evidence of the debt created by the loan, Robert C. Losey and his wife, Emma J., appellee herein, executed and delivered to said decedent a promissory note. At the same time, and to secure payment of the note, Emma J., her husband, Robert C., joining, executed and delivered to said decedent a mortgage upon her separate real estate. She executed the note and gave the mortgage as surety for her husband, and in no other capacity, the money neither having been borrowed nor used by her, nor used for her benefit in any way to make her property primarily liable.

On the 6th day of August, 1878, Robert C. Losey was discharged in bankruptcy from all of his debts, including said note.

On the 29th day of September, 1878, he and the decedent, payee of the note, without the consent or knowledge of Emma J., entered into an agreement which they indorsed upon the back of the note, as follows:

> "In consideration of the extension of time for three years from September 2, 1878, and the reduction of the rate of interest from ten per cent to six per cent per annum, I hereby assume to pay promptly the interest at six per cent semi-annually, and the principal of the within note on or before September 2, 1881.
>
> "R. C. Losey."

Subsequent to said agreement Robert C. paid several installments of interest on the note. At the time the note and mortgage were executed, and at the time the above written agreement was made, the payee and mortgagee knew that Robert C. and Emma J. Losey were husband and wife; that the real estate mortgaged was her separate property, and that she executed the note and mortgage as surety for her husband, and in no other capacity.

The above are substantially the facts specially found by the court below. Upon those facts the court rendered judgment in favor of the plaintiff, against Robert C. Losey, for the amount of the note, and for Emma J. for costs, having concluded as a matter of law, that by reason of the foregoing facts, the mortgage was discharged and satisfied, and her real estate released.

The question for decision here concerns the rights of the wife, Emma J. Under the present statutes, a wife may not mortgage her separate property to secure her husband's debts.

The mortgage in suit was executed in 1875. Under the statutes then in force, such a mortgage was valid. Its validity was not affected by the change in the statutes. It is well settled that a wife who has mortgaged her separate property for her husband's debt, when she may do so, is in the position of a surety, and entitled to all the rights of a surety, and that her liability and the mortgage lien are discharged by an extension of time of payment without her consent, if the extension be a binding obligation upon the mortgagee. Her rights in this respect are the same as if she were sole. Trentman v. Eldridge, 98 Ind. 525 (534), and the cases there cited; Bank of Albion v. Burns, 46 N. Y. 170; Smith v. Townsend, 25 N. Y. 479.

Relying upon this rule of law, counsel for Emma J. contend that the agreement between the husband and the decedent, the payee indorsed upon the back of the note, operated as an extension of the time of payment, and thus released her property.

In response to that contention, counsel for appellant contend in the first place, that the evidence does not show that the decedent, payee, at any time had notice that Emma J. was surety for her husband, and that hence she cannot avail herself of the rule which releases a surety by an extension of the time of payment, and in the second place, that she cannot avail herself of that rule for the reason that the husband had been discharged in bankruptcy, and thereby became a stranger to the note. These in their order. In order that an extension of the time of payment may release the surety, it is essential that the payee shall have knowledge of the suretyship. Davenport v. King, 63 Ind. 64; McCloskey v. Indianapolis, etc., Union, 67 Ind. 86, s. c., 33 Am. Rep. 76; Arms v. Beitman, 73 Ind. 85; Gipson v. Ogden, 100 Ind. 20.

When however a person accepts a mortgage in his favor upon the separate property of a married woman, knowing her to be a married woman, and that the property is her separate property, he is bound to inquire concerning the consideration, and ascertain, if he may, by reasonable inquiry from her, whether it is for the benefit of another, and unless misled by the conduct or representations of the wife, he will be held to have acquired knowledge of the facts which prudent inquiry would have discovered. Cupp v. Campbell, 103 Ind. 213. See Smith v. Townsend, *supra*.

Under this rule, and under a less liberal rule, there is evi-

dence sufficient to justify the court below in finding that the payee knew that Emma J. was a married woman, and that she was mortgaging her separate real estate to secure a debt of her husband, notwithstanding she signed the note with him. Being a married woman, she was not personally liable upon the note.

There was in the mortgage an agreement to pay the amount thereby secured. That agreement made the mortgage effective so far as the right to foreclose was concerned, but created no personal liability against her. Trentman v. Eldridge, *supra*. Robert C. Losey was discharged in bankruptcy from all his debts, including that for which the mortgage in suit was given. That discharge released him absolutely from all legal and personal liability upon the note, and the agreement to pay contained in the mortgage. Root v. Espy, 93 Ind. 511. Ordinarily a surety is released when the debt for which he is surety is discharged, and ordinarily a mortgage given to secure the payment of a debt, and having in it no promise to pay such debt, becomes ineffectual, and is barred when the debt is barred or in any way discharged. Lilly v. Dunn, 96 Ind. 220; Bridges v. Blake, 106 Ind. 332.

Those general rules apply where the discharge of the principal debt and debtor is by some act or neglect of the creditor, and not to a discharge by operation of law, being as it is, against the consent and beyond the power of the creditor. Phillips v. Solomon, 42 Ga. 192. In speaking of the rights and liabilities of sureties, and the effect of the bankrupt law thereon, the court there said: "We are inclined to think . . . . that it was not the intent of Congress to do anything more than to declare that the act should not be construed so as to discharge sureties, and that this was done not so much to fix the law of the case, as by way of caution to prevent the act from being construed to have an effect, that by its terms it would not have. In other words, the contract of a surety, as it is understood in the commercial world, is always conditioned that the surety shall not be discharged by the bankruptcy of the principal."

It was further said that the sections of the bankruptcy law upon the subject of sureties were only in furtherance, and declaratory of, what would have been true had those sections not been put in the act. The court also quoted with approval the following from Theobald on Principal and Surety: "The obligation of the surety also, in general, becomes extinct by the

extinction of the obligation of the principal debtor. An exception to this rule takes place, whenever the extinction of the obligation of the principal arises from causes, such as bankruptcy and certificate, which originate with the law, and not in the voluntary acts of the creditor." See also Gregg v. Wilson, 50 Ind. 490; and to the same effect, 1 Pars. Notes and Bills, 249; 1 Pars. Cont. 29; Ward v. Johnson, 13 Mass. 148; Blumenstiel Bankruptcy, 543.

Whatever may have been the purpose or necessity of it, the bankrupt law under which Losey was discharged provided in explicit terms, that no discharge under it should release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as indorser or surety, etc. Bump Bankruptcy (9th ed.), 732, and cases there cited. See also King v. Central Bank, 6 Ga. 257; Hall v. Fowler, 6 Hill, 630; Camp v. Gifford, 7 Hill, 169; Knapp v. Anderson, 15 N. B. R. 316; Gregg v. Wilson, *supra.*

The above mentioned provision of the bankrupt act, as interpreted by the courts, and the general principles of the law, require a holding here that the mortgage in suit was not discharged by the discharge in bankruptcy of Robert C. Losey, the principal debtor. In re Hartel, 7 N. B. R. 559. See also Catterlin v. Armstrong, 101 Ind. 258.

Emma J., having mortgaged her property for the debt of Robert C., and thus occupying the position of surety, he was liable to her for whatever might be collected from her property in payment of the debt. In that sense, he was her debtor. She was in a position to have caused the debt, to secure which the mortgage was given, to be proved against the estate of the bankrupt debtor, in order that it might be reduced by whatever dividends were made, if any. Such proof was expressly authorized by the bankrupt law. And because that proof might have been made, the discharge of Robert C. Losey discharged him from all liability to Emma J. by reason of the mortgage. Blumenstiel Bankruptcy, 545; Bump Bankruptcy, 682; Mace v. Wells, 7 How. 272; Baker v. Vasse, 1 Cranch C. C. 194; Hunt v. Taylor, 4 N. B. R. 683; Kerr v. Hamilton, 1 Cranch C. C. 546; In re Perkins, 10 N. B. R. 529; Brandt Suretyship, § 189.

It results from what we have said, that after the discharge of Losey in bankruptcy, he was neither liable upon the notes nor otherwise to the payee, nor was he in any way liable to

Emma J., who, by reason of the mortgage upon her separate property, occupied the position of surety.

Did then, the agreement between the bankrupt debtor and the payee and mortgagee, release her and her property as surety?

The rule is universal, that an extension of the time of payment by the creditor, by a binding contract with the principal, and without the knowledge and consent of the surety, will release the surety.

While there is no substantial disagreement between law authors and courts as to the reasons upon which the rule rests, there is some diversity in the statement of those reasons.

It is sometimes said that the reason why an extension of the time of payment discharges the surety is, that he would be entitled to the creditor's place by substitution, and the creditor, by agreement with the principal debtor for an extension of the time, without the surety's consent, disables him from suing when he would otherwise be entitled to do so, upon payment of the debt. The case of Tiernan v. Woodruff, 5 McLean, 350, was made to rest upon that reason. There, after the maturity of the note, and after the discharge in bankruptcy of the principal debtor, the creditor entered into a sealed agreement with him, without the knowledge or consent of the surety, and for a valuable consideration, that he, the creditor, would not, for the space of two months, commence any proceedings in law or equity, or otherwise, against him, the principal debtor upon the note. It was held that our bankrupt law extinguished the debt of the bankrupt, even against the surety; and that after the discharge of the principal debtor, the surety had no remedy but to present his demand against the estate of the bankrupt, and that he had no recourse against the bankrupt.

At the close of the opinion it was said: "The time given to Romeyn (the bankrupt), under these circumstances, by no possible means could have operated to the prejudice of the defendant (the surety). The settled rule of law therefore as to the effect of giving time to the principal debtor, does not and cannot apply in this case. After the extension complained of, as well as before it, the indorser could have proved the extent of his liability against the bankrupt's estate, and that was the only remedy, which under the circumstances the law gave him."

The same reason for the rule has been made prominent in some of our own cases. In some of the cases it has been said,

that the agreement must be such as to tie the hands of the principal debtor, and fetter and embarrass the surety. Wingate v. Wilson, 53 Ind. 78; Bucklen v. Huff, 53 Ind. 474; Dickerson v. Board, etc., 6 Ind. 128; s. c., 63 Am. Dec. 373; Harbert v. Dumont, 3 Ind. 346.

Citing the case of Tiernan v. Woodruff, *supra,* Judge STORY, in his work on Promissory Notes, at section 415, in speaking of an extension of the time of payment by the creditor, said: "Or, if being for a valid consideration, it be of such a nature that the maker can by law obtain and entitle himself to the same delay without the consent of the holder (as where the holder has been already discharged from the note in bankruptcy), then the agreement will not operate as a discharge of the indorsers, for the reason that the indorsers cannot, under such circumstances, be injured by the delay, or if injured, it is by operation of law, and not dependent upon the act of the holder."

Citing that case also, Mr. Daniel, in his work on Negotiable Instruments, at section 1313, said: "The reason why extension of time of payment discharges the surety is that he would be entitled to the creditor's place by substitution; and if the creditor, by agreement with the principal debtor, without the surety's assent, disables himself from suing when he would be otherwise entitled to do so, and thus deprives the surety, on paying the debt, from immediate recourse on his principal, the contract is varied to his prejudice—hence he is discharged. But this principle on which sureties are released 'is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties by which they are supposed to be injured.' Therefore when there is a legal impossibility of injury, the principle does not apply. This was decided to be the case where the maker of a note was a discharged bankrupt; and an agreement between him and the holder for two months' delay, although on a valid consideration, it was held did not discharge the indorser, because the latter could not, by making payment, have recourse against him."

If the rule releasing sureties by an extension of the time of payment rested upon the reason above mentioned, and upon none other, it would perhaps be the duty of the court to hold here, that the mortgage by Emma J. was not released by the agreement made and indorsed upon the back of the note. But the rule, we think, rests also upon another reason, quite as important

and controlling as that already named, and that is, that a valid and binding agreement between the creditor and the principal debtor, without the consent or knowledge of the surety, for an extension of the time of payment, is a modification or alteration of the contract for the performance of which the surety obligated himself, or bound his property.

That reason is recognized, if not asserted, in some of our own cases. The general doctrine, with an exception which we need not here notice, as declared by all of the authorities, is that in order to release the surety, there must be a new contract between the creditor and principal debtor, fixing the time of payment at a different date from that fixed in the original contract; that the contract for extension must be based upon a new and sufficient consideration, and that the extension must be to a fixed time, so that the contract may embody the necessary elements of certainty; in short, that the contract for extension must embody the necessary elements of a valid and binding contract. See Wingate v. Wilson, *supra;* Chrisman v. Perrin, 67 Ind. 586; Hogshead v. Williams, 55 Ind. 145; Coman v. State, 4 Blackf. 241; Harter v. Moore, 5 Blackf. 367.

In the case of Pierce v. Goldsberry, 31 Ind. 52, it was said, in speaking of the release of sureties by an extension of the time of payment: "It takes from the surety a right which he had under the contract into which he entered, the exercise of which may be essential to his indemnity." And again: "Sureties are favorites, and will not be held beyond the strict scope of their engagements."

In Daniel on Negotiable Instruments, at section 1312, it is said: "The principle that whatever discharges the principal discharges the surety is of extended application, and it is operative whenever anything is done which relaxes the terms of the exact legal contract by which the principal is bound, or in anywise lessens, impairs, or delays the remedies which the creditor may resort to for its assurance or enforcement."

In Story on Promissory Notes, at section 414, is this: "On the other hand, the indorsers, by such an agreement for credit or delay for a prolonged period without their concurrence, would, if the doctrine were not as above stated, be held liable for a period beyond their original contract, and might suffer damage thereby; or at all events, would be bound by a different contract from that into which they had entered."

In stating the reason of the rule releasing sureties by an extension of the time of payment, Mr. Brandt, in his work on Suretyship, at section 206, said: "The reason is, that the surety is bound only by the terms of his written contract, and if those are varied without his consent it is no longer his contract, and he is not bound by it. It therefore follows that the fact that the principal is insolvent, or that the extension would be a benefit to the surety if he remained bound, makes no difference in the rule. Moreover the surety has a right when the debt is due, according to the original contract, to pay it, and immediately proceed against the principal for indemnity, and he is deprived of this right by such an extension of the time of payment."

In the case of Ide v. Churchill, 14 Ohio St. 372 (383-4), Judge RANNEY said: "Every contract is composed of the material terms and stipulations embraced in it, and among these none is more important than the time of performance. It follows, from the principles already stated, that whatever changes any of these material terms and stipulations, so as to destroy the identity of the obligation to which the surety acceded, necessarily discharges him from liability. An engagement to pay money in six months, is not the same as one to pay it in twelve months; and if the creditor, by a valid agreement with the debtor, extends the time of performance from the shorter to the longer period, he supersedes the old obligation by the new, and cannot enforce payment until the longer period has elapsed. If the surety is sued upon the old agreement, to which alone his undertaking was accessory, he has only to show that that has ceased to exist, and no longer binds his principal, and if he is sued upon the substituted agreement, he is entitled, both at law and in equity, to make the short and conclusive answer, *non hoec in foedera veni.* But such an agreement between the principal parties is perfectly valid and legal, and until some method can be devised for depriving the principal of the benefits of a valid agreement, or of binding the surety to an agreement to which he never acceded (a work hitherto thought not to be within the powers of either courts or legislatures), the discharge of the latter must ensue. I am very well aware, that this discharge has been often thought to rest upon the injurious consequences of such arrangements, either real or possible, upon the rights and interests of the surety, and undoubtedly in most cases, such would be their necessary tendency. But if it rested upon this ground alone, it would be very

difficult upon equitable principles to extend the relief beyond the actual injury; while it is universally agreed that they work a total discharge, and extend to cases where no possible injury to the surety could have ensued."

In line with the above case, see Valley National Bank v. Meyers, 17 N. B. R. 257; Huffman v. Hulbert, 13 Wend. 375; Schnewind v. Hacket, 54 Ind. 248.

In the case of Haden v. Brown, 18 Ala. 641, it was held, as in the Ohio case, *supra*, that the surety was discharged by an extension of the time of payment, because such an extension was a change and alteration of the contract.

A surety is bound only by the strict terms of his engagement. He assumes the burdens of a contract without sharing its benefits. He has a right to prescribe the exact terms upon which he will enter into an obligation, and insist upon his discharge if those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, *non hoec in foedera veni*—this is not my contract. Markland Mining and Mnfg. Co. v. Kimmel, 87 Ind. 560; Weed Sewing Machine Co. v. Winchel, 107 Ind. 260; City of Lafayette v. James, 92 Ind. 240; s. c., 47 Am. Rep. 140.

In the case before us, Emma J. mortgaged her separate property as security for the performance of the contract between her husband, the debtor, and appellant's decedent, the payee, as that contract was evidenced by the note. That contract, as thus evidenced, measured and fixed the manner and extent to which her property was to become liable. Irwin v. Kilburn, 104 Ind. 113; Weed Sewing Machine Co. v. Winchel, *supra.*

If then there has been a modification or alteration of that contract, the mortgage cannot be foreclosed. If there has been such a change or modification, the property of Emma J. cannot be made liable as security for the original contract, because it no longer exists as originally made, nor as security for the contract as changed, because that would be to make the surety liable beyond the scope of the contract. The note is not the contract, but the evidence of it. In some of the cases above cited, it was expressly held that an agreement between the creditor and principal debtor for an extension of the time of payment, not indorsed upon the note or written instrument, so far as appears,

operated as a modification and change of the contract as evidenced by the note or written instrument.

Here Losey, the principal debtor, and the payee, not only agreed that the time of payment should be extended beyond the time as originally agreed upon and named in the note, but also agreed upon and named a rate of interest for the future different from that originally agreed upon and named in the note. Not only that, but they indorsed the agreement upon the note. The agreement thus indorsed upon the note operated as a modification and change of the original agreement. In other words, after the consummation of the latter agreement, indorsed upon the back of the note, Losey and the payee were no longer bound by the agreement as written upon the face of the note, but by that agreement as modified and changed by the subsequent agreement indorsed upon the back of the note. After that indorsement, their agreement was to be ascertained by an examination of the face of the note and indorsement. The two writings are to be construed together. Together they constitute the contract between Losey and the payee. To hold otherwise, would be to hold that the latter agreement was and is of no validity whatever. The latter agreement, by its terms, is to pay the note as written, with a change in time and rate of interest. That there was a sufficient consideration for that agreement there can be no doubt. In consideration of the change of time and rate of interest, Losey exchanged a moral obligation only for a legal liability.

In our conclusion that the contract between Losey and the payee is evidenced by the face of the note and the indorsement upon the back of it, we are fully supported by the cases of Beckner v. Carey, 44 Ind. 89, and Harden v. Wolfe, 2 Ind. 31. It is not easy, if it is possible, to reconcile with those cases the cases of Huff v. Cole, 45 Ind. 300, and Bucklen v. Huff, 53 Ind. 474, from the opinion in each of which cases, it may be remarked, there was a dissent by one of the judges. There are some differences between the indorsement upon the back of the note in the case before us and the indorsement upon the back of the notes in those cases. The cases may therefore be distinguishable. But if there were no differences, we should disapprove those cases and follow the cases of Beckner v. Carey, and Harden v. Wolfe, *supra.* The contract between Losey and the payee, as evidenced by the face of the note and the indorsement upon the back of it, is not the contract between them as it existed at the

time Emma J. executed the mortgage, and to secure the performance of which on the part of Losey she mortgaged her separate property. Losey and the payee changed that contract without her consent or knowledge by agreeing upon a different rate of interest and a different time for payment.

The contract to secure which she mortgaged her property can be inforced by no one, and for the contract as changed neither she nor her property is liable. To hold her property liable upon the original contract as evidenced by the note, would be to hold it liable for the default in payment by Losey, three years before he could be in default under the contract as changed; and to hold her property liable upon the changed contract, would be to hold it liable for a contract different in time of payment and rate of interest from that which entered into and formed a part of the contract as evidenced by the mortgage. To hold her property liable upon the original contract would be to measure the liability of the principal by one standard, and the liability of the surety by another and different standard. But it is said, that because Losey had been discharged in bankruptcy from all his debts, he became a stranger to the note, and that therefore the change in the contract agreed to by him cannot affect Emma J. or the mortgage given by her.

In answer to that it is sufficient to say, in the first place, that by his discharge Losey did not become, in every sense, a stranger to the note. The discharge released him from all legal liability upon it, and in that sense extinguished the debt; but it did not pay the debt, nor release him from the moral duty of paying it. The moral obligation was a sufficient consideration for his subsequent promise to pay it. Hockett v. Jones, 70 Ind. 227; Shockey v. Mills, 71 Ind. 288; s. c., 36 Am. Rep. 196; Meech v. Lamon, 103 Ind. 515; s. c., 53 Am. Rep. 540; Wills v. Ross, 77 Ind. 1; s. c., 40 Am. Rep. 279; Jenks v. Opp, 43 Ind. 108.

In the second place, the bankruptcy of Losey did not destroy, change or affect the contract of the surety. Emma J. mortgaged her property to secure the performance of the contract between Losey and the payee as it existed at the time the mortgage was executed. The discharge of Losey from legal liability upon that contract did not, and could not, affect her rights. His discharge from legal liability upon the contract did not destroy or alter it. To hold that it did, would be to hold that it absolutely released the mortgage. The contract between Losey and the payee, so

far at least as the surety was concerned, remained the same after as before the discharge of Losey.

The only difference was, that by reason of his discharge, he was no longer legally liable upon the contract. He might however waive the immunity afforded by his discharge, and pay the debt according to the terms of the note. To secure the performance of the contract according to the terms of the note, and in no other way, the separate property of Emma J. was mortgaged. In order that Losey might again become liable for the payment of the principal sum, the payee consented that the contract might be changed as to the time of payment and the rate of interest. The contract, as evidenced by the face of the note and the indorsement upon the back of it, thus became the contract between Losey and the payee. By the change, the contract as originally executed ceased to exist, both as a legal and moral obligation on the part of Losey. And this is so, whether the new promise be regarded as a revival of the original contract, so far as consistent with it, or whether it be regarded as an entirely new contract.

This suit is really upon the changed contract, because copies of the face of the note and the indorsement upon the back of it are both filed with the complaint as the cause of action.

In any view that may properly be taken of the case, it must be held that the property of Emma J. is no longer liable. As the court below so ruled, the judgment is affirmed, with costs.

End

WEIL v. THOMAS. 1894.

114 N. C. 197; 19 S. E. Rep. 103.

Appeal from superior court, Wayne county; H. G. Connor, Judge.

Action by H. Weil & Bros. against J. H. Thomas and wife and others to foreclose a mortgage. Plaintiffs except to the terms of the decree, and appeal. Affirmed.

Burwell, J. We find no error in the judgment to which the plaintiffs except. It conforms to the principle announced in Shinn v. Smith, 79 N. C. 310; Davis v. Lassiter, 112 N. C. 128, 16 S. E. 899; and Hinton v. Greenleaf, 113 N. C. 6, 18 S. E. 56, and cases there cited. According to these authorities, a married

woman who has mortgaged her land to secure the payment of a debt of her husband has the rights of a surety as to the liability she has thus imposed on her property, and can require that all of her husband's estate that is mortgaged to secure the debt shall be exhausted before her land is sold; and she has a right to object to the diversion of funds that should have been applied on the debt to her exoneration, if such diversion was made without her consent. She being dead, her heirs are entitled to like protection. It is proper and just that all the husband's interest in the land covered by the mortgage should be exhausted before the estate of her heirs therein shall be taken and sold.

Affirmed.

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g.* *Mere delay on the part of the creditor in enforcing the obligation against the principal will not discharge the surety.

ALLEN v. HOPKINS. 1896.

98 Ky. 668; 34 S. W. Rep. 13; 56 Am. St. Rep. 382.

Appeal from circuit court, Boyd county.

"To be officially reported."

Action by John Alley against John C. Hopkins and others. Judgment for defendants, and plaintiff appeals. Reversed.

HAZELRIGG, J. Several years prior to 1886 John Alley loaned to the firm of Hogan & Son $1,000, and upon the back of the firm's note for that sum the names of Hopkins and the other appellees appeared as accommodation indorsers. On June 11th of the year named, the form of the paper was changed, and under the firm's name the appellees wrote their names as sureties. This note was due in 12 months, and contained no provisions as to interest. On it were the indorsements, "Interest paid up to June 11, 1888," and "Interest paid up to June 11, 1889." In November, 1889, suit was brought against the principals, and judgment obtained; but it appears they had become insolvent, and in October, 1890, this action was instituted against the sureties. They pleaded that, for a valuable consideration, the payee had extended indulgence to the principals for a definite period, and forborne to sue on the original contract, and whether or not this is true is the only question presented on this appeal. The con-

tention of the sureties is that the testimony shows that, upon the maturity of the note, on June 11, 1887, Hogan & Son paid Alley $100, a like sum on June 11, 1888, and a like sum on June 11, 1889; that upon the payment of each of these sums, Alley agreed that the firm should keep the money for another year, the consideration for the extension of credit being the payment of usurious interest, or $40 each year in excess of legal interest; that this was a novation, and effected their discharge, or, at any rate, here was an agreement, in consideration of interest to be paid, by which a definite time was fixed within which the payee had lost his right to resort to his legal remedy. It is conceded that no interest was paid in advance. The principal agreed, when he borrowed the money, to pay 10 per centum interest per annum, and at the maturity of the note, in June, 1889, he paid the exact sum he agreed to pay, and no more. So far, therefore, the surety is not affected. If, however, in addition to complying with its provision to pay this interest, the firm secured a valid and enforceable contract to keep the money another year,—a contract which would prevent Alley from suing for his money, or the firm from paying it if it so desired,—then the original attitude of the parties has been changed, and the sureties are released. The proof on the particular point involved is within a small compass, though not altogether free from confusion. Alley is positive that the only agreement ever made was that the Hogans were to pay him 10 per cent., and that this was paid for three successive years, each year as interest for the preceding year, and that he made no arrangement or agreement for any succeeding year, except to say that, if he did not need the money, the firm might keep it by paying the 10 per cent. interest. Hogan, Sr., upon whose testimony the sureties rely, proves that he agreed to pay, and did pay, 10 per cent. at the end of each year as interest for the preceding year, and it was then agreed that the firm might keep the money for another year at the same interest. On cross-examination, he states that there was no consideration given by him, directly or indirectly, that Alley should not collect his money whenever he pleased. The testimony of Hogan, Jr., the only other witness, is too indefinite to be of any value. It is manifest that the payment of the $100 did not to any extent form the basis of the agreement to let the Hogans keep the money for a succeeding year. The agreement to extend the credit for a year was solely because of the promise of the Hogans to again

pay a like sum at the end of the extended period. They paid this interest solely because they agreed to do it. It was their contract. So far, therefore, as the various payments of interest are concerned, the rights of the sureties are not affected; and the simple question remains, was there an agreement to extend the time of payment for a definite time in the future in consideration of a promise to pay interest at the rate stated? It is clear however, that the rate agreed on is immaterial. So far as it was beyond the legal rate, it was usurious, and the contract was not enforceable save to the extent of the legal rate. But while the note, after the first year, bore 6 per cent., and an agreement that that rate should be paid was no more than the law said should be paid, yet the promise to extend the time definitely in consideration of an agreement to pay the legal rate would be based on a valuable consideration, because, as said in McComb v. Kittridge, 14 Ohio 351, cited and approved in Robinson v. Miller, 2 Bush. 188, "the law does not secure the payment of this interest for any given period, or prevent the discharge of the principal at any moment. There is precisely the same consideration for the extension of time as there was for the original loan." A careful examination of Hogan's testimony convinces us that the arrangement he had was a general one, commencing in 1883, when he first borrowed the money, that he was to pay 10 per cent. interest at the end of each year, and was to keep the principal sum at that rate so long as he wanted it or the payee did not choose to demand it. While the witness, in his examination in chief, speaks with some positiveness of his agreement to keep the money another year, on his cross-examination he qualifies his statements by saying, in one instance, "the only agreement we had, I was to pay him 10 per cent. for his money." And from his language, quoted heretofore, it is manifest that there was no agreement by which the payee might not collect his money "whenever he pleased to do so."

From the testimony as a whole, we are impressed with the belief that great surprise would have been expressed by all the parties if, upon the tender of the money by the Hogans, Alley had refused to accept it by reason of an agreement that the payors were to keep it for any definite period in the future, or if Alley had demanded the principal and the Hogans had asserted the right to keep it for any specified time. The alleged arrangement or agreement is entirely too indefinite to support

the belief that we have here a case of a legal novation. We cannot believe that the proof authorizes the conclusion that, by any new contract, the sureties were denied any of their rights, or were at all obstructed in any of their remedies, legal or equitable. They could have paid the debt at any moment, and have been subrogated to the rights of the creditor, or they could have required the creditor to sue notwithstanding the indefinite arrangement existing between the principal and his debtor. In reaching these conclusions, we have not overlooked the circumstances surrounding the parties to be affected. Alley was an old man,—over 73,—and apparently unlettered. He was simply willing to let the earnings of his farm and log business stay out at 10 per cent, as long as his security was good. To construe his passive indulgence into an agreement binding him not to collect his money would be a perversion of the proof as affected by the surroundings. The debtors were quite willing to keep the money as long as they were not required to pay it, but never thought to defeat recovery at any time by the plea of an agreement to extend the credit for any definite time. At least, they did not do so when sued in November, 1889, as they might have done had such an agreement existed. The sureties were residents of the same town, and it is fair to presume, knew the debt had not been paid. Their remedies were, in fact, unobstructed; and if they did not choose to urge the collection of the debt, they and not Alley must bear the resulting loss. Judgment reversed, for proceedings consistent with this opinion.

SECOND NATIONAL BANK OF LAFAYETTE v. HILL.
1881.

76 Ind. 223; 40 Am. Rep. 239.

Action on a promissory note. The opinion states the case. The defendant had judgment below.

MORRIS, C. This suit is upon a promissory note, dated April 12, 1877, executed by Samuel Hill, John Hair and William Mote for $300, payable four months after date, to the order of the appellant, at its bank in Lafayette, with five per cent attorney fees and with interest at the rate of ten per cent per annum after

maturity, without relief from valuation or appraisement laws. The suit was commenced in the Tippecanoe Circuit Court, and taken by change of venue to the Carroll Circuit Court.

The defendant Hill answered the complaint in three paragraphs, though the record says that the answer contained four paragraphs, there are but three in the record. It is not material how this may be, as the answer was the separate answer of Hill. Judgment was rendered against him and in favor of the appellant, and he does not complain. We need not further notice the proceedings as to Hill.

Hair and Mote filed a joint answer in four paragraphs. The appellant demurred to the fourth paragraph of their answer. The demurrer was overruled. It then replied to the first, second, third and fourth by a general denial. There was a special reply to the fourth paragraph of the answer of Mote and Hair. The cause was submitted to a jury. Verdict for the appellant against Hill, and against it and in favor of Mote and Hair. Motion by the appellant for a new trial, which was overruled. Judgment upon the verdict. The evidence is made part of the record by bill of exceptions.

The rulings of the court upon the demurrer to the fourth paragraph of the answer of Mote and Hair, and on the appellant's motion for a new trial, are assigned as error.

The fourth paragraph of the answer of Mote and Hair admits the execution of the note in suit, and then states that the defendant Hill signed the note as principal, and that they, Mote and Hair, signed it as the sureties of Hill; that the bank knew at the time that Hill was principal, and they his sureties; that the note was given for money borrowed by said Hill of the appellant; that the appellant is a banking corporation, organized under the National Banking Law; that after the maturity of the note, said Hill made general deposits in the appellant's bank, from time to time, to the amount of $8,000, and in sums exceeding the amount due on said note; that said Hill, prior to the maturity of the note, "had consented and directed the appellant to allow and pay said note, interest, etc., thereon at any time after its maturity, out of his deposits in said bank, if he should have any such funds in said bank to pay the same or any part thereof;" that after said note became due, the appellant had of the funds of said Hill on deposit in its bank, more than enough to pay said note, interest, etc.; that it failed and neglected to apply any of

the funds of said Hill so on deposit in its bank as aforesaid (except $53), in payment of said note, but long subsequent to the maturity of said note, suffered said Hill to check said funds out of said bank. Wherefore they say they are discharged.

The question raised by the demurrer to this paragraph of the answer is: Did the appellant, by failing to apply to its payment the money which Hill had on general deposit in its bank, at and after the maturity of the note, discharge Mote and Hair, the known sureties of Hill on the note? That the bank had a right so to apply the money which Hill had on general deposit after the maturity of the note, with or without the consent or direction of Hill, will not be seriously questioned. In speaking of general deposits, Morse says: "So soon as the money has been handed over to the bank, and the credit given to the payer, it is at once the proper money of the bank. It enters into the general fund and capital, and is indistinguishable therefrom. Thereafter the depositor has only a debt owing him from the bank; a chose in action, not any specific money, or a right to any specific money." Against the debt thus due the depositor, the bank may set off any debt due from the depositor to it. Morse on Banking, pp. 30 and 42; Commercial Bank, etc., v. Hughes, 17 Wend. 94; Beckwith v. Union Bank, etc., 4 Sandf. 604.

Though the funds deposited with the appellant might have been applied by it to the payment of the note in suit, the bank did not hold the funds, in any sense, in trust for the sureties of Hill on the note. Had Mote and Hair, as such sureties, paid to the appellant the note in suit, they could not, had the bank at the time been indebted to Hill on his deposit account in a sum exceeding the amount paid on the note, have required the bank to apply such indebtedness for their benefit, or to reimburse them for the money paid by them on the note for Hill's benefit. They could not have required this of the bank for the obvious reason that they could not have, under the circumstances, any right to or interest in the debt due from the bank to Hill.

In the case of Voss v. German American Bank, 83 Ill. 599; s. c., 25 Am. Rep. 415, the note sued on was as follows: "Chicago, Oct. 4, 1873. Fifteen days after date we promise to pay to the order of the Germania Bank of Chicago three hundred dollars, at their office, with interest at the rate of ten per cent per annum after due, until paid. Value received. Signed. Albert Michelson. Indorsed: A Voss." "The note," says the court, "appears

to have been made for Michelson's benefit, and Voss to have been only a surety, as between himself and Michelson, and as Michelson is shown to have had funds on deposit in the bank, from time to time, after the maturity of the note, and before the bringing of the suit, to an amount exceeding that of the note, it is insisted that the bank was bound to apply such funds to the payment of the note, and that not having done so, Voss was discharged. And the case of McDowell v. Bank of Wilmington and Brandywine, 1 Harring. 369, and Law v. East India Co., 4 Ves. 824, are cited as authorities, that under such circumstances, a surety will be discharged. Without remark upon or consideration of these authorities, we do not regard them as having application to the case in hand. We do not recognize, in such a case as is here presented, the existence of any such obligation as the one which is asserted by appellant's counsel."

The case of McDowell v. Bank of Wilmington, etc., *supra*, seems to be the other way. The bank had means in its hands which might have applied to the payment of the note. The court says: "Upon what principle of justice can such a creditor in a court of equity claim to hold the surety bound, after the debt had been in point of fact paid, if the creditor had elected to say so or to so consider it. The creditor could have set off the debt and charged it in the account, and having the power, was it not his duty to do so in justice to the surety?"

The question is not what the creditor might or could have done, but was he obliged to do this or discharge the surety? The creditor might sue the principal debtor as soon as the debt matured, and thereby save the surety from future hazard, but he is not obliged to sue. He may delay the collection of his debt even until the principal debtor fails, without discharging the surety. To hold that the bank was obliged to apply the deposits made by Hill to the payment of the note, would be to compel him to collect his debt, though none of the parties bound to pay it had requested him to do so.

The case of Martin v. Mechanics' Bank, etc., 6 Har. & J. 235, is in point. The action was upon a bill of exchange for $645, drawn by W. P. Strike on W. & A. H. Woods, payable to Martin, and was indorsed by him and others to the bank. The bill was dated August 24, 1819, and due at nine months. On the 20th of June, 1820, and after the bill matured, W. & A. H. Woods had on general deposit in the bank $700, sufficient to pay the

bill. The sum thus on deposit was not applied by the bank in payment of the bill, but soon thereafter paid out on the checks of the depositors. Martin, the indorser of the bill, contended that the $700 on deposit June 20, 1820, should be held to be a payment of the bill; or if not, the transaction amounted, in law, to a waiver of the right of the bank to proceed against him as indorser; that he was exonerated from all liability. The court held that the deposit was not a payment of the bill, and that the failure of the bank to apply the deposit to the payment of the bill did not release the indorser. The court also held that the deposits made from time to time, after the maturity of the bill, and the paying out of the same upon the checks of the depositors, did not indicate a purpose, on their part, to apply the money in payment of the bill, but rather the contrary; that under such circumstances, the law will not require the banker to disappoint its customers by such an application of his deposits.

True, it is averred in the answer, that Hill said to the appellant, some time before the maturity of the note, that when it matured, any sum that he might then have on deposit might be applied to its payment. But this is just what he said, by implication of law, whenever he made a general deposit in the bank. The act of making such a deposit was authority to the bank to apply the deposit to the payment of the note in suit. The statement of Hill gave the bank no additional authority. The checks subsequently drawn by Hill upon the bank were a withdrawal of his previous directions upon the subject. It was competent for Hill and the bank to make any disposition of the deposits, before their actual application, which they might see proper. The sureties of Hill had no interest in such deposits. They were not trust funds held by the bank for their benefit.

It is true, that the creditor, having obtained security for his debt, becomes a trustee of the same for all parties concerned. If he obtains judgment against the principal and takes out execution, but does not levy it, though the principal debtor has property on which a levy might be made, he does not, unless the execution operates as a lien, by delay, however long continued, discharge the surety; but if he causes a levy to be made, he cannot release it without discharging the surety to the extent of the value of the property levied upon. So in this case, the mere fact that the appellant might have applied the deposits to

the payment of the debt is not enough. The debt due from the bank to Hill on his deposit account was not a collateral security in its hands to the debt due from Hill and the appellees to the bank. Philbrooks v. McEwen, 29 Ind. 347; Hampton v. Levy, 1 McCord Ch. 107; Lang v. Brevard, 3 Strobh. Eq. 59.

In the case of Glazier v. Douglass, 32 Conn. 393, the plaintiff sued the defendant, as the indorser of a note made by Henry Rogers & Co., for $515, payable to the order of the defendant, which was indorsed by him, for the accommodation of the makers, to the plaintiff. At and after the maturity of the note, the makers, who became insolvent, were indebted to a firm, of which the plaintiff was a member in a sum not exceeding the amount of the note sued on, and by a statute of the State the plaintiff had a right to set off the indebtedness of the makers of the note to said firm against the amount due on the note. The plaintiff did not do this, but with a full knowledge of all the facts, paid the makers the amount due them, and then brought this suit against the defendant as the indorser of the note.

The defendant insisted that the failure of the plaintiff to set off the amount due from Rogers & Co. to said firm against the note sued on, released him from liability as indorser. The court held that he was not released. We quote from the opinion, as follows:

"By a series of decisions adopting the equitable principles of the civil law, there have been annexed to the undertaking of a surety in a case like this, three conditions, and if either is broken by the creditor, that undertaking becomes inoperative, and the surety is discharged.

"The first is that the creditor shall present the note to the maker for payment at maturity, and if dishonored, use due diligence in giving notice to the surety. The second is that no obligatory extension of the time of payment shall be given which will preclude the surety, if he pay the note to the creditor, from enforcing immediate repayment by compulsory process from the principal debtor. And the third is, that the creditor shall apply in payment of the debt, or hold in trust for the benefit of the surety, all securities which he may receive or procure for that purpose by contract or operation of law, so that if compelled to discharge the debt, the surety may be subrogated to them. * * *

"In respect to what shall be deemed a security within the meaning of the condition, there has been some contrariety of

decision. The better opinion is, that it must be a mortgage, pledge or lien—some right to or interest in property which the creditor can hold in trust for the surety, and to which the surety, if he pay the debts can be subrogated, and the right to apply or hold must exist and be absolute."

Had Mote and Hair paid the note sued on to the bank, would their right to the debt due from the bank to Hill have been absolute? Could they, as against Hill or the bank, have claimed to be subrogated to that debt? Did the bank become the trustee of its own debt to Hill, and hold it in trust for Mote and Hair? We think the debt due from the bank to Hill for the deposits made by Hill was not a trust fund, that it was not held by the bank in trust for the appellees. Pease v. Hirst, 5 Man. & R. 88.

The question involved in this case is one of some practical importance, and we have endeavored to give it that consideration which its importance demands. We believe that the conclusion which we have reached will be found to be supported by the weight of authority and in agreement with the business usages of the country.

We think the court erred in overruling the demurrer in the fourth paragraph of the answer of Mote and Hair, and that the judgment below should be reversed.

It is ordered that upon the foregoing opinion the judgment below be reversed at the costs of appellee.

Judgment reversed.

NATIONAL MAHAIWE BANK v. PECK. 1879.

127 Mass. 298.

Contract on a promissory note for $500, dated December 29, 1875, signed "Jos. A. Benjamin, Treas.," payable to the order of the defendant in forty-five days after date at the plaintiff bank, and indorsed by the defendant. Trial at June term, 1878, of the superior court, without a jury, before ROCKWELL, J., who reported the case for the determination of this court, in substance as follows:

Benjamin kept an ordinary banking account with the plaintiff bank. At the time of giving the note in suit, he was treasurer of the town of Egremont, and the bank gave him for this note

a draft to be used for the payment of a tax due from the town. The note and the proceeds of it were not made a part of his account with the bank, and the bank regarded the note as an official or town matter.

On February 15, 1876, when this note matured, all things necessary to charge the defendant as indorser were done. On that day, and ever since, the bank held a note, made by Benjamin, which it had discounted, signed "Jos. A. Benjamin," dated November 13, 1875, for $1,500, payable in three months after date at the plaintiff bank to one Callender, and indorsed by Callender. And on said February 15, there stood to the credit of Benjamin, as his balance of account, the sum of $381.10, and the same continued so to stand on the books of the bank until about six weeks before the trial, when it was indorsed as of February 16, 1876, on the note for $1,500.

On February 16, 1876, the day of the maturity of the note for $1,500, the president of the plaintiff bank and its principal financial manager, during business hours, told the cashier, if the $381.10 standing to Benjamin's credit was not drawn out by his checks before the close of business hours, to apply it on the $1,500 note; and at the close of the bank for that day, it being found that Benjamin had drawn no checks on said balance, he again directed the cashier to apply it on the $1,500 note.

On February 19, 1876, during business hours, the defendant brought to the bank a check of Benjamin, made and handed to defendant on that day, and which was as follows:

"South Egremont, Mass., Feb. 15, 1876. $381. National Mahaiwe Bank pay to the order of J. A. B., Treas., note 15th inst., three hundred and eighty-one dollars. Jos. A. Benjamin."

The defendant at the same time, acting at the request of Benjamin, tendered to the cashier of the plaintiff bank this check and $120 in money in payment of the note in suit, and demanded the note. The money had been furnished by Benjamin, but it did not appear that he informed the cashier of the bank of this fact. The cashier declined to receive the check and money, and told the defendant he could not accept the check, because he had been directed to apply the balance of Benjamin's account on another claim held by the bank, meaning the $1,500 note. After this refusal, the cashier did, at the request of the defendant, receive the $120 and indorse the same on the note in suit, it being at the time understood that neither party intended thereby

to waive his rights in reference to the check. The $120 have been retained by the bank.

It is not the practice of the bank to charge over-due notes held by it to the account of a depositor until he has sufficient credits to pay the note. Benjamin became a bankrupt in the spring of 1876, and died in July or August of that year.

Upon the foregoing facts, the defendant contended, as a matter of law, that the plaintiff was not entitled to recover; and the judge so ruled, and found for the defendant. If this ruling was correct, judgment was to be entered for the defendant; but if the plaintiff was entitled to recover, judgment was to be entered for him for the sum of $381.10, and interest from February 16, 1876.

Gray, C. J. Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only; but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount. Foley v. Hill, 1 Phillips, 399, and 2 H. L. cas. 28; Bank of Republic v. Millard, 10 Wall. 152; Carr v. National Security Bank, 107 Mass. 45. So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes to the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterwards insist that it should have been so applied. The bank, being the absolute owner of the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation, as in Baker v. Briggs, 8 Pick. 122, and American Bank v. Baker, 4 Met. 164, cited for the defendant. The right of the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a set-off, or of an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be made as to benefit the surety. Glazier v. Douglass, 32 Conn. 393; Field v. Holland, 6 Cranch, 8, 28; Brewer v.

Knapp, 1 Pick. 332; Upham v. Lefavour, 11 Met. 174; Bank of Bengal v. Radakissen Mitter, 4 Moore P. C. 140, 162.

The general rule accordingly is, that where moneys drawn out and moneys paid in, or other debts and credits, are entered, by the consent of both parties, in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account; but where by express agreement, or by a course of dealing, between the depositor and the banker, a certain note or bond of the depositor is not included in the general account, any balance due from the banker to the depositor is not to be applied in satisfaction of that note or bond, even for the benefit of a surety thereon, except at the election of the banker. Clayton's case, 1 Meriv. 572, 610; Bodenham v. Purchas, 2 B. & Ald. 39, 45; Simpson v. Ingham, 2 B. & C. 65; S. C. 3 D. & R. 249; Pemberton v. Oakes, 4 Russ. 154, 168; Pease v. Hirst, 10 B. & C. 122; S. C. 5 Man. & Ryl. 88; Henniker v. Wigg, Dav. & Meriv. 160, 171; S. C. 74 Q. B. 792, 795; Strong v. Foster, 17 C. B. 201; Martin v. Mechanics Bank, 6 Har. & Johns. 235, 244; State Bank v. Armstrong, 4 Dev. 519; Commercial Bank v. Hughes, 17 Wend. 94; Allen v. Culver, 3 Denio, 284, 191; Voss. v. German American Bank, 83 Ill. 599. In the decision in McDowell v. Bank of Wilmington & Brandywine, 1 Harringt. (Del.) 369, and in the dicta in Dawson v. Real Estate Bank, 5 Pike, 283, 298, cited for the defendant, this distinction was overlooked or disregarded.

In many of the cases, indeed, the money appears to have been deposited after the debt to the bank matured, so that the case was analogous to the ordinary one of a payment, which, not being appropriated by the debtor might be appropriated by the creditor. But where the balance of account is in favor of the depositor when his debt to the bank becomes payable, it is a case of mutual debts and credits, which, except in proceedings in bankruptcy or insolvency, neither the depositor nor his surety has the right to require to be set off against each other. Judge Lowell, in allowing money on deposit to the credit of a bankrupt to be set off in bankruptcy against the aggregate debt due from him to the bank, said: "This deposit, though it operates as security and as payment, was not intended for either, but is made so by the bankruptcy of the debtor." In re North, 2 Lowell 487. See, also, Demmon v. Boylston Bank, 5 Cush. 194; Strong v. Foster, 17 C. B. 217.

In Strong v. Foster, a depositor gave to his bankers a promissory note with a surety, which was not entered in his general banking account; and it was held, that the surety, when sued by the bankers on the note, could not set up, either as payment or by way of equitable defense, that shortly after the note matured the balance of account was in favor of the depositor to a greater amount, and the plaintiffs did not apply that balance in discharge of the note, or inform the defendant for three years afterwards that the note remained unpaid. But the reasoning of the court applies quite as strongly when the balance in favor of the depositor exists at the time when his debt becomes payable, as when it is created by subsequent deposits. Chief Justice JERVIS said: "Here the note was never entered in the account at all; the rule as to adjusting balance therefore does not apply." "It would be essentially altering the position of parties, to establish that, because a banker, who holds a note of a third person for a customer, has a balance in his hands in the customer's favor at the maturity of the note, such third person is thereby discharged, if it turns out that the note was given by him as surety. There is no authority in equity for any such position, and none certainly in law." 17 C. B. 216, 217. And Mr. Justice WILLES observed: "As to what was said on the part of the defendant, that, if a set-off arises between the creditor and the principal debtor, the liability of the surety of the note is extinguished; that doctrine would lead to singular results. These securities are often given to increase credits of bankers to their customers. If the liability of the maker were to depend upon the state of the customer's account at any one moment, he might never undergo the liability contemplated at all. The security is given without any reference to the other side of the account. This is the first time, I believe, that it has ever been suggested, that when a note given under circumstances like these falls due, and there is a balance in favor of the customer at the time, that balance must of necessity be applied to the discharge of the note." 17 C. B. 224. Even the usual inference from the entry of such a note in the account may be controlled by other circumstances. City Discount Co. v. McLean, L. R. 9 C. P. 692.

In the case at bar, it appears that the consideration received by Benjamin from the plaintiff bank for the note in suit was to be used by him in his official capacity as town treasurer, the note was regarded by the bank as an official or town matter, and neither

the note nor its consideration was ever made part of his general banking account; and that, when the check in favor of the defendant was drawn by Benjamin and presented at the bank, the bank held a personal note of Benjamin, overdue and exceeding in amount the balance of account is in his favor at the time, the president of the bank had directed the cashier to apply this balance to the latter's note, and the cashier so informed the defendant when he presented the check. Under these circumstances, neither Benjamin, the maker, nor the defendant, the indorser, has the right to insist that this balance of account should be applied to the satisfaction of the note in suit, rather than of the other note of Benjamin; and, according to the terms of the report, there must be

Judgment for the plaintiff.

PURSIFULL v. PINEVILLE BANKING COMPANY.

97 Ky. 154; 53 Am. St. Rep. 409.

EASTIN, J. This action was brought December 12, 1893, in the Bell Circuit Court, by appellee, as assignee of the Pineville Banking Company, against appellant and one Hurst, on a note executed by them December 23, 1889, and payable thirty days thereafter to the order of said banking company, and negotiable and payable at said bank. This note was discounted at and was held and owned by said bank at the time of its maturity, January 23, 1890.

Appellant filed an answer in the court below, in which he alleged, among other things, that he was merely a surety and that his co-defendant, Hurst, was the principal in said note, and that these facts, as well as the fact that he had received no part of the proceeds of said discount, were well known to the bank at the time. Said answer further alleges that, at the time said note matured, and prior thereto, and for some time thereafter, the principal therein was a depositor with, and had to his credit as a general deposit in said bank a large sum of money, much more than sufficient to pay said note, that the bank had a lien thereon for the payment of said note, but, without the knowledge or consent of appellant, released its said lien and permitted Hurst, the

principal in said note, to withdraw the whole of said deposit, leaving the note unpaid; that it did not, at the maturity of said note, or any other time, notify appellant that the note was unpaid, and that he, knowing that Hurst had this large deposit in the bank at and after the maturity of the note, supposed it had been paid until this suit was brought against him thereon nearly four years thereafter. The answer further alleges that Hurst has, in the meantime, become and is wholly insolvent, and that if he shall be compelled to pay said note by reason of the bank having released its lien on said deposit, he will now be entirely without remedy against his principal.

To this answer appellee filed a general demurrer, which was sustained by the court, and thereupon, at the same term of court, appellant offered to file and tendered an amended answer in which, after reiterating the statements of his original answer, he also charges that this note, being made negotiable and payable at the bank, was, in effect, an order from Hurst on said bank to appropriate and apply from his deposit therein a sufficient sum to pay the note at maturity; that the bank was thereby made his agent to pay the same, and that, by the negligence of said bank, this application was not made, and the note not paid. It further pleads and relies upon the failure of the bank to apply to the payment of the note other deposits made by Hurst after the maturity of the note and when his insolvency was known to the bank.

To the filing of this amended answer appellee objected and insisted on his demurrer to the answer as offered to be amended, and the court sustained the objection and refused to allow the amended answer to be filed. Appellant declined to plead further, the petition was taken for confessed, a judgment for the amount of the note and interest was entered against him, and from that judgment he prosecutes this appeal.

In view of this statement from the record, and of the action of the court below in sustaining the demurrer to the original answer and refusing to allow the amended answer to be filed, we think there is but one question to be considered by this court.

That question is, whether or not, in this state, the surety on a negotiable note, made payable at, and discounted to and owned by a bank which holds, on general deposit for the principal in the note, at the maturity thereof, a sum more than sufficient to pay the same, is discharged from liability thereon, by reason of the failure of such bank to apply to the payment of the note a suf-

ficient sum from this unappropriated deposit, and by reason of its permitting the entire deposit to be checked out, for other purposes, by the principal, who afterward becomes insolvent?

This question has never been settled by any adjudication of this court, and we are aware that the decisions of the courts of other states are not in entire harmony, and that there is some contrariety of opinion among the textwriters on the subject.

In considering the proposition, it is well for us to remember that this bank was the absolute owner of this note and not a mere collecting agent to look after the proper presentment of the note, and to demand payment in behalf of another. The bank was the creditor of Hurst, the principal in the note, to the amount thereof, and was his debtor in the amount of the deposit then standing to Hurst's credit in the bank.

As to the right of the bank, under the doctrine of setoff, to have applied to the payment of this note, from Hurst's unappropriated deposit, enough money to pay the same, by simply charging the note to his account, there seems to be no difference of opinion, and it is only as to the duty of the bank in this respect as between it and the surety on the note, that the authorities differ.

As to this, Mr. Morse, in his text-book, says: "If a note payable at a bank is sent there for collection, and the bank fails to apply an unappropriated deposit of the maker to its payment, the indorser is discharged. When a creditor has within his control the means of paying the debt out of property of the debtor properly applicable to the purpose, and does not use the opportunity, but gives up the property, the surety is discharged": 2 Morse on Banks and Banking, 3d ed., sec. 562.

A similar doctrine is laid down in some of the decisions of the state courts, particularly in the cases from Pennsylvania, in one of which the learned judge, after referring to the well-recognized principles that the relation between the bank and its depositor is simply one of debtor and creditor, and that the bank has the right to apply an unappropriated general deposit to the payment of a matured note held by it against its depositor, which right it may waive unless the rights of third parties have intervened, propounds the following query which seems to us very aptly to illustrate the situation in this case, to-wit: "If I am the holder of A's note indorsed by C, and when the note matures I am indebted to A in an amount equal to or exceeding the note, can I

have the note protested and hold C as indorser? It is true A's note is not technically paid, but the right to setoff exists, and surely C may show, in relief of his obligation as surety, that I am really the debtor instead of the creditor of A. If this is so between individuals, why is it not so between a bank and individuals?" Commercial Nat. Bank v. Henninger, 105 Pa. St.

Counsel for appellee, however, in support of their contention, that the conduct of the bank in this case, as set forth in the answer and admitted by the demurrer, did not operate as a discharge of the surety, rely mainly upon the cases of National Mahaiwe Bank v. Peck, 127 Mass. 302, 34 Am. Rep. 368, and Second Nat. Bank v. Hill, 76 Ind. 223, 40 Am. Rep. 239.

As to the former, the case from Massachusetts, it is sufficient to say that it is clearly distinguishable from this case. There the bank held two notes of B., one of which was executed by him in his official capacity, as treasurer of a town, and the other was executed by him individually. B. kept only a personal account with the bank. The note executed by him in his official capacity was indorsed by P., who, a few days after the maturity of that note, presented to the bank the check of B. on his individual account, and demanded that it be applied to the payment of the official note on which P. was indorser. To this demand the bank answered that it had already applied B's deposit toward the payment of his individual note, which had also matured, though not until after the maturity of the official note. In the action which was brought against P. by the bank to enforce the collection of this official note which he had indorsed, it was shown that neither this note nor its proceeds ever went into or constituted any part of B's personal account in the bank, and it was accordingly held that the bank, as against the surety on this official note, had the right to charge up B's personal note, which had also matured, against his personal account, as it had already done before this demand was made upon it to pay the official note out of this account. The distinction between that case and this is apparent.

The case of Second Nat. Bank v. Hill, 76 Ind. 223, 40 Am. Rep. 239, relied on by counsel for appellee, does fully support the position for which they contend.

But in that case it is also held, in conformity with the well settled doctrine on the subject, that a bank has the right, under the state of facts admitted in this case, to apply the deposit to the payment of its demand, if it chooses to do so. It is further-

more held in that case that a creditor may not release a collateral security by the principal debtor, or a lien which it may hold on his property, without discharging the surety, and these propositions are, we believe, recognized as fundamental in all the cases. If the security be in the nature of a lien by pledge of collateral, or by mortgage, or under an execution against the principal debtor's property, then, in any such case, it would be admitted that a release by the creditor of such security would discharge the surety, to the extent, at least, of the value of the security so surrendered.

Now, while it is true that the bank in this case had not, strictly speaking, a lien upon any money or property belonging to Hurst, and while the surety could not, perhaps, by paying this debt to the bank, have become entitled to demand of it repayment out of Hurst's deposit, which is laid down by some of the authorities as the true test, yet, it seems to us that this bank, by the voluntary surrender to the principal of money more than sufficient to pay this debt, and which it is conceded that it had a right to apply to that purpose, has been equally reckless of the interests of this surety as though it had surrendered a security on which it had a specific lien. As said by the text-writer, above quoted from, in criticising this case in 76 Indiana: "If the bank at the maturity of a note held by it holds funds that, by the scratch of a pen, it could apply upon the note, thus securing itself, it is difficult to see why neglecting so easy a means of security is not as improper as giving up collateral expressly designated for the purpose of securing the note": 2 Morse on Banks and Banking, 3d ed., sec. 563.

The right on part of this bank to retain a sufficiency of Hurst's deposit gave it the absolute control of an ample security for the payment of this debt. A lien by pledge could give no higher right to the security than this bank had. It had the unquestioned right to actually appropriate and apply this money, which it owed to Hurst, to the payment of Hurst's debt to it. It matters not whether the right to the security has its origin in the doctrine of setoff or under a pledge as collateral. It is the extent of the right to the security, rather than the source from which that right springs, that should determine the question whether the creditor can voluntarily surrender the security without releasing the surety; and, having had in its hands a fund which it could, by mere exercise of its option to do so, have used for the satisfaction

of this debt, and which, we may assume, the dictates of ordinary diligence and of prudent banking would have prompted it to thus use, this bank has, in our judgment, been guilty of bad faith toward the surety, who, according to the facts as they are admitted here, knew of this large deposit to the credit of his principal, who received no notice of the non-payment of the note until nearly four years thereafter, and who assumed, as he had a right to do under these circumstances, that the note had been paid at maturity.

If the facts be as alleged in the answer and admitted by the demurrer, and as we are bound, therefore, to assume them to be, this bank has shown such an utter disregard of, and such absolute indifference to, the interests of the surety, as to entitle him to a release from the liability which would have been satisfied by the principal, if the bank had simply chosen to have it satisfied, and had exercised its opinion in favor of, instead of against, the surety.

Wherefore, the judgment of the lower court sustaining the demurrer to the answer and rendering judgment against appellant is reversed, and the action is remanded for further proceedings consistent with this opinion.

End

CHAPTER VII.

EFFECT ON CREDITOR OF AGREEMENT BETWEEN DEBTORS AS TO PRIMARY LIABILITY.

a. *When the grantee in a deed assumes and agrees to pay a mortgage on the premises conveyed, on which the grantor is personally liable, the grantee becomes the principal debtor and the grantor the surety for the payment of the mortgage debt; and an extension of time to the grantee will release the grantor.*

KLAPWORTH v. DRESSLER. 1860.

2 Beasley's Chancery (N. J.) 62; 78 Am. Dec. 69.

Bill to foreclose mortgage filed by Klapworth and wife against Dressler and Ise. The opinion states the case.

By court, Green, Chancellor. It appears by the master's re-

port that the mortgage in question was given by the defendant Dressler, on the eleventh of August, 1853, for the whole purchase-money of the mortgage premises at that time conveyed to him by the complainants. On the first of August, 1854, Dressler conveyed the premises to Ise, the other defendant, by a deed of bargain and sale, stating therein that the premises are sold "subject to a mortgage for three hundred dollars, which Herman Ise does hereby agree and assume to pay, and it is so understood by the parties to these presents." The master further reports that, in his opinion, the said Herman Ise should be decreed to pay the deficiency (if any) with interest and costs, after applying to the payment of the debt the proceeds of the sale of the mortgaged premises, and to be personally liable to the complainant therefor.

1. Is Ise, the purchaser, liable to the complainant for the deficiency?

2. Can the liability be enforced in this form of proceeding?

The premises are not merely conveyed to the plaintiff subject to the mortgage debt. When this is done, the grantee takes the premises subject to the incumbrance, but incurs no personal responsibility. But the grant is here made upon the specific condition that the grantee agrees and assumes to pay the debt. By the acceptance of the title the clause becomes his covenant, and he thereby becomes bound to the grantor to pay the mortgage debt, and liable to him for any deficiency which may exist upon a sale of the mortgaged premises: Finley v. Simpson, 22 N. J. L. 311 (53 Am. Dec. 252), and cases there cited.

Does this liability inure in equity to the complainants? and may it be enforced for their benefit? If the complainants, after a sale of the mortgaged premises, should enforce payment of the balance by an action at law against Dressler upon his bond, it is clear that he would have his remedy over against Ise. May the complainants have their remedy in equity directly against Ise when Dressler is insolvent, or no remedy can be had against him personally?

Where a grantee in a deed covenants with the grantor to pay off an incumbrance subsisting upon the premises, if the grantor is personally liable for the payment of the incumbrance, the grantee, by virtue of the agreement, is regarded in equity as the principal debtor, and the grantor as a surety only. And it is also a principle in equity, that "a creditor is entitled to the benefit of all collateral obligations for the payment of the debt, which a

person standing in the situation of a surety for others has received for his indemnity, and to relieve him or his property from liability for such payment": Curtis v. Tyler, 9 Paige 432; Halsey v. Reed, Id. 446; King v. Whitely, 10 Id. 465; Blyer v. Monholland, 2 Sandf. Ch. 478; Rawson v. Copland, Id. 251; Trotter v. Hughes, 12 N. Y. 74 (62 Am. Dec. 137).

These cases fully establish the principles above stated, and recognize their application to a case like that now before the court. The case of Blyer v. Monholland, 2 Sandf. Ch. 478, is directly in point. Adopting and applying these principles, they control the present case.

Dressler is legally liable to the complainant for the payment of the complainant's mortgage. Ise has covenanted with Dressler to pay the debt, and is eventually liable. It is a part of the price which he was to pay for the premises. Whether the covenant bound him to pay the debt to Dressler, or directly to the complainants, is in equity immaterial. The effect of this arrangement made Dressler in equity the surety of Ise in respect of the mortgage debt to the complainants. The obligation inured in equity to their benefit. This result is perfectly equitable and just, as between all the parties. The debt is justly due and owing to the complainants. Ise is, by the terms of his deed, bound to pay it. It is a part of the price of the land to which he holds the title. Dressler is not in equity liable for the debt. He has no interest in the land. He parted with his interest to Ise, and as a part of the price, received his covenant to pay this debt. In equity, the debt is the debt of Ise, and Dressler the mere security. If Dressler should be compelled to pay, he would have recourse over immediately to Ise. If, therefore, Dressler were able and willing to pay the debt, the decree against Ise is in accordance with equity. But the bill charges, and the master reports, that Dressler is insolvent, and if this relief is denied the complainants, the result will be that the complainants lose their debt, and Ise requires title to the land without paying the price which he covenanted to pay. I cannot doubt that a decree against Ise, as prayed for in the bill of complaint, is in strict accordance with the principles of equity.

It remains to be considered whether the complainants are entitled to such relief upon a bill to foreclose.

In New York, on a bill filed for the satisfaction of a mortgage, it is the practice to decree payment by the mortgagor, or by any

other person who may have become security for the payment of the debt, of the balance of the debt remaining unsatisfied after a sale of the mortgaged premises. This is done, however, by virtue of the express provisions of their statute: 2 R. S. 191, secs. 152, 154 (1829).

Independent of statutory provision, the rule of equity is, that a bill to foreclose is in the nature of a proceeding *in rem,* and the party is confined in his remedy to the pledge. The suit is not intended to act *in personam:* Dunkley v. Van Buren, 3 Johns. Ch. 331.

In this case, the bill was filed to foreclose a mortgage given to secure the payment of a bond. The bill, in form, was an ordinary foreclosure bill. The complainant applied for a decree directing the mortgagor, in case of a deficiency upon the sale of the mortgaged premises, to pay the remainder of the debt. It was ruled that his proper remedy was at law upon the bond: Hunt v. Lewin, 4 Stew. & P. 138.

But if the bond be lost, or if there be other special circumstances which, independently of the mortgage, give the court jurisdiction over the demand, a decree against the mortgagor will be made for the balance of the debt remaining unsatisfied by a sale under the mortgage: Green v. Crockett, 2 Dev. & B. Eq. 390; Crutchfield v. Coke, 6 J. J. Marsh. 89.

In this case, the complainant has no remedy whatever at law against Ise. The claim is purely equitable, and must be enforced, if at all, in a court of equity. The bill is framed with a view to this form of remedy, and prays for this specific relief. It charges that Ise is responsible for the debt. He has had a full opportunity of answering. Under these circumstances, there is no reason why he should not be decreed to pay the debt under the bill.

CALVO v. DAVIES. 1878.

73 N. Y. 211; 29 Am. Rep. 130.

Appeal from judgment of the General Term of the Supreme Court, in the first judicial department, affirming a judgment in favor of defendant Davies, entered upon an order sustaining a demurrer to the complaint on his part. (Reported below, 8 Hun 222.)

This action was brought to foreclose a mortgage. The complaint alleged in substance the execution of the mortgage by defendant Davies and wife as collateral security for the bond of Davies, the assignment of the bond and mortgage to plaintiff, and that there had been a default, and that there was a specified amount due and unpaid thereon. The complaint further alleged that defendant Davies and wife conveyed the premises to defendant Leslie, who took the conveyance subject to the mortgage, and in and by the conveyance assumed and agreed to pay the same; that on the 21st day of November, 1872, by an agreement between plaintiff and Leslie, "the time for the payment of the principal sum aforesaid was extended from the 8th day of March, 1872, to the 15th day of October, 1874, with the express understanding that the said bond and the mortgage should remain in every other respect unaffected by said agreement," also, that Leslie subsequently conveyed the premises to defendant Woodruff. Plaintiff asked judgment for any deficiency against defendants Davies and Leslie.

Defendant Davies demurred, on the ground that the complaint as to him did not state facts sufficient to constitute a cause of action.

ANDREWS, J. The mortgaged premises became, on the conveyance by Davies to Leslie of the equity of redemption, as between Davies and his grantee, the primary fund for the payment of the mortgage; but the right of the mortgagee to resort to the bond for the collection of his debt was not affected or impaired by the conveyance. Davies could not, by any dealing or contract with Leslie, change the rights of the creditor to proceed on the bond, or compel him to resort in the first instance to the land (March v. Pike, 10 Paige 595). On the other hand Davies' relation to the debt was not changed by his conveyance so as to take away his right as debtor, to pay the debt at any time after it became due, and upon his paying the debt, either voluntarily or by compulsion, he would, upon the doctrine of equitable subrogation, be entitled to be substituted to the mortgage security as it originally existed, with the right to proceed immediately against the land for his indemnity. (Tice v. Annin, 2 J. Ch. 125; Vanderkemp v. Shelton, 11 Paige 28; Marsh v. Pike, *supra.*) The mortgagee, after the conveyance by Davies, could not deal with the grantee of the equity of redemption, to the prejudice of his right of subrogation, without discharging Davies from liability for the debt,

either wholly or *pro tanto*. If, for example, he had, pursuant to an agreement with Leslie, without the consent of Davies, satisfied or released the lien of the mortgage, it is plain that he would thereby, as to Davies, have discharged the debt, at least to the extent of the value of the land. The rule that a mortgagee is bound, in dealing with his security and with the bond, to observe the equitable rights of third persons, of which he has notice, has been frequently recognized. (Tice v. Annin, *supra;* Halsey v. Reed, 9 Paige 446; Stevens v. Cooper, 1 J. Ch. 425; Howard Ins. Co. v. Halsey, 8 N. Y., 271.) And the doctrine that a surety is discharged by dealings between the creditor and principal debtor, inconsistent with the rights of the surety, has been applied, although the creditor did not know, in the origin of the transaction, that one of the parties was a surety, and also when, by an arrangement between two original joint and principal debtors, one of them assumed the entire debt, and this was known to the creditor. (Pooley v. Harradine, 7 El. & Bl., 431; Oriental Financial Corporation v. Overend, Gurney & Co., L. R., 7 Ch. App., 142; Millerd v. Thorn, 56 N. Y., 402; Colgrove v. Tallman, 67 id., 95.)

We think it must be held, upon the authorities, that the rights of the parties in this case are to be determined by the rules governing the relations of principal and surety, and that if the dealings between the mortgagee and Leslie would have discharged Davies, if he had been originally bound as surety only, the action against him cannot be maintained. (Halsey v. Reed, 9 Paige, *supra;* Burr v. Beers, 24 N. Y. 178; Flower v. Lance, 59 id. 603.)

That an agreement by the creditor with the principal debtor, extending the time for the payment of the debt, without the consent of the surety, discharges the latter, is established by numerous authorities, and the court will not enter into the question, what injury the surety has sustained. (Rees v. Berrington, 2 Ves. Jr., 540; Rathbone v. Warren, 10 J. R., 587; Miller v. McCan, 7 Paige 452.) The plaintiff, in her complaint in this case, sets forth facts which justify a judgment of foreclosure; but she also demands a judgment for any deficiency against the defendant Davies. The defendant Davies interposed a general demurrer to the complaint. The complaint avers the making of the bond and mortgage by Davies, its assignment to the plaintiff, the conveyance by Davies to Leslie in November, 1871, of the equity of redemption, subject to the mortgage, and his agreement to pay

the same, and the amount due and unpaid thereon. If the plaintiff had stopped here a cause of action against the defendant Davies would appear in the complaint; but she further alleges that in November, 1872, by an agreement made by the plaintiff with the defendant Leslie, the time for the payment of the debt was extended from March 8, 1872, to October 15, 1872, "with the express understanding that the bond and mortgage should remain in every other respect unaffected by the agreement."

The agreement, if construed as an absolute agreement for the extension of the time of payment of the mortgage, *prima facie* operated to discharge Davies from liability on his bond. It was valid and binding between the parties, and the mortgage could not be enforced during the time covered by the agreement, either by the plaintiff or by Davies. Davies, on paying the debt, would be entitled to be subrogated to the security, but he would stand in the place of the creditor, and would take the mortgage subject to the agreement. (Ducker v. Rapp, 67 N. Y., 471; Bangs v. Strong, 10 Paige 11.) The learned counsel for the plaintiff contends that the agreement as alleged reserves the right of the creditor against Davies. When in an agreement between a creditor and the principal debtor extending the time of payment, the remedies against the surety are reserved, the agreement does not operate as an absolute, but only as a qualified and conditional suspension of the right of action. The stipulation in that case is treated in effect as if it was made in express terms, subject to the consent of the surety, and the surety is not thereby discharged. (Story's Eq. Jur. § 326; Bangs v. Strong, 10 Paige 18; Kearsley v. Cole, 16 M. & W. 128; Oriental Financial Corporation v. Overend, Gurney & Co., 7 H. of L. Cas., 348; Morgan v. Smith, 70 N. Y. 537.) But we are of opinion that the agreement alleged does not bring the case within the principle of these decisions.

The "understanding" that the mortgage should in all other respects remain unaffected by the agreement, except as to the time of payment, emphasizes the one purpose of the agreement, viz., to extend the time of payment. The other stipulations in the mortgage were to remain in force as if the agreement extending the time had not been made. It would be a forced and unnatural construction to hold that the parties designed to reserve to the creditors a right to proceed at once against Davies, which would enable the plaintiff to defeat the sole purpose of the agreement. The court in Claggett v. Salmon (5 Gill. & Jo., 314) affirmed the

decree of the chancellor, who held that the extension relied upon in that case was consistent with the obligation entered into by the sureties, and the agreement expressly provided that it should not interfere with or invalidate the liability of the sureties on the mortgage executed by them.

The further point is taken by the plaintiff that the averment of the agreement of extension may be rejected, leaving it for the defendant to bring the agreement to the notice of the court by answer. But we think the whole complaint is to be considered in determining whether it states a cause of action, as well the allegations which tend to discharge the defendant Davies, as those which tend to charge him.

These views lead to an affirmance of the judgment.

All concur, except MILLER, J., absent.

Judgment affirmed.

GEORGE v. ANDREWS. 1882.

60 Md. 26; 45 Am. Rep. 706.

Injunction. The opinion states the case. The injunction was granted below.

IRVING, J. The questions in this case arise upon a bill for injunction to stay certain proceedings at law. The court below granted the injunction, and the plaintiff in the proceedings at law appealed. The principal facts essential to the determination of the controversy are undisputed, and the rest are established by proof. The principal contention is respecting the law applicable to them.

The facts are as follows: On the 31st day of July, 1872, the appellees R. Snowden Andrews and Mary Lee Andrews, his wife, executed a mortgage to Archibald George, upon certain premises on North Calvert street, in Baltimore City, belonging to Mrs. Andrews, to secure the sum of $5,000. This mortgage was afterward in December, 1872, assigned by Archibald George to Samuel K. George, the appellant.

In October, 1871, John S. Meredith executed a mortgage to the appellant, upon certain premises belonging to the mortgagor, upon North Avenue, in Baltimore City, to secure the payment of $4,000.

On November 4, 1872, John S. Meredith and Andrews and wife exchanged properties, and Meredith conveyed the North avenue property to Mrs. Andrews subject to the mortgage from him to George; and Andrews and wife conveyed the North Calvert street property to Meredith subject to the mortgage from them to Archibald George, and which was the following month assigned to the appellant. In this exchange Meredith assumed and agreed to pay the mortgage debt upon the North Calvert street property, and Andrews and wife agreed to pay the mortgage debt of Meredith on the North avenue property. In addition to this undertaking on the part of Andrews and wife, they agreed to pay Meredith $3,500 "boot" for difference in value in the exchanged properties; and to secure that sum Andrews and wife executed to Meredith a mortgage for $3,500, payable in three years from date.

After this exchange, the interest notes on the Calvert street mortgage debt were given by Meredith to Samuel K. George, the appellant; and the interest notes upon the mortgage on the North avenue property were given by Andrews and wife to the appellant who collected the same, generally through his bank. When Meredith's mortgage on North avenue property fell due, Andrews and wife secured indulgence for a while and then paid it off, taking a release under seal dated 19th October, 1875. When the $3,500 mortgage to Meredith, on same property, from Andrews and wife fell due in July, 1875, it was extended for one year and then paid off. The appellant collected the interest, from Meredith, on the Calvert street mortgage until July, 1875, when the same became due. Then at the request of Meredith, and without consultation with Andrews and wife and entirely without their knowledge, for a bonus of $150 he extended the period for payment of that mortgage by Meredith for three years; taking interest notes from Meredith on the mortgage debt for that period and marking the principal note of Andrews and wife renewed for three years. When it again fell due, at Meredith's request and without the knowledge of appellees of this or former extension, it was again extended for a consideration of $50 for one year. This mortgage, under the extension agreements, became payable in July, 1879. Default then having been made, proceedings to foreclose were instituted, a decree was obtained, and the property sold. After paying expenses the proceeds of sale did not pay the mortgage debt.

About $1,500 remained unsatisfied. To recover this deficiency a suit was instituted by the appellant against the appellee, upon the covenant in the mortgage given to Archibald George, which was assigned to the appellant as hereinbefore stated. This was an instrument under seal and a bill in equity was necessary to secure to appellees the benefit of the equitable defense, supposed to result from the character of the dealings between the appellant and John S. Meredith, with respect to the mortgaged property on Calvert street.

In addition to the facts already stated, the bill charged that the appellant had full knowledge of the exchange of property made by the appellees and John S. Meredith, and of the undertaking of each, in that exchange, to pay the debt of the other to the appellant, resting on the property respectively transferred; and that he assented thereto. It also charges that the action of the appellant in extending the time for Meredith to pay the mortgage debt on the Calvert street house, first for three years and then for one year, was entirely without the knowledge or consent of the appellees, and without consultation with them or either of them; and that both the appellant and Meredith regarded the latter as the sole debtor for the $5,000 resting on the Calvert street property, and that appellant and appellees acted during that whole period in their transactions on that understanding. It also charges that acting on that understanding, the appellees paid off the whole of the $3,500 debt, created in the exchange and secured by mortgage on North avenue property to Meredith; whereas if it had been intimated that they were in any wise to be held responsible for the debt on the Calvert street property, a sufficient amount of the $3,500 debt to Meredith could have been kept back to meet the ascertained deficiency. The complainants then charge that they were released by the appellant George giving direct assent to their recited agreement with Meredith; but if they were not, still the appellant after the exchange could only look to them as securities for Meredith, and that the giving time to Meredith without their consent, knowledge or acquiescence operated to release them. Injunction was accordingly prayed.

The appellant by his answer in effect admitted the several allegations of the bill except the allegation of knowledge on his part of the exchange between the parties alleged in the arrangement by which each of his debtors was to become answerable for

the other's debt to him, which he denies, and also denies that he ever assented to the arrangement or released or intended to release the appellees from liability for the debt on the Calvert street property. He avers that the transactions with Meredith for extension of time were managed entirely by Mr. Guest as his agent, and he denies he ever received any bonus for the same, or ever knew of it. He also avers that he has brought the suit for the benefit of John C. George, his *cestui que trust.*

The case having been brought to hearing upon the proofs in the cause before the Circuit Court for Baltimore City, that court made the injunction against prosecuting the suit at law perpetual.

In his opinion the learned judge placing his decree upon the equities resulting to the appellees from the conduct of the appellant in extending the time for Meredith on the Calvert street property, most forcibly and tersely says: "It must be conceded that when Andrews and wife sold his property to Meredith, subject to the mortgage to George, and left their notes for the principal and interest in the possession of George, they had a right to have the property immediately sold upon any default by Meredith in the payment of either principal or interest. This right they could exercise by a demand upon George to pursue his remedy against the property; a demand which he could not disregard. When therefore by a binding agreement between himself and Meredith he deprived himself of meeting the demand of Andrews and wife, he released them from a liability which he might have averted by a compliance with such demand. This consequence could only have been avoided by a distinct agreement with Meredith, that the suspension of the remedy against the property was not to be operative if Andrews and wife should require the property to be sold for their protection on Meredith's default. But I find in the evidence no record of such an agreement."

We find no error in this ruling nor in the reason assigned for it. On the contrary, we think it is fully sustained by the proof in the cause, and justified by the most approved text-book authority and judicial decision. * * * * * * * * *

In 1 Jones on Mortgages, §§740-741, the doctrine is most clearly stated, that generally one purchasing land subject to mortgage not only purchases the equity of redemption, but purchases the whole estate, and assumes the payment of the mortgage

as part of the purchase-money. Generally an express agreement is made to that effect (as was done here), and the deed drawn subject to the payment of the mortgage. In such case as between the parties the purchaser becomes primarily liable for the debt and the mortgagor only security; "and as between them the mortgaged property becomes the primary fund for the payment of the debt." The same author says the mortgagee may by his dealings with the purchaser and mortgagor recognize the purchaser as principal and the mortgagor as only security toward himself. It is also stated, that "any material alteration of the mortgage contract will discharge the mortgagor." It is still further stated in section 742, thus: "A purchaser having assumed the payment of an existing mortgage and thereby become the principal debtor, and the mortgagor a surety of the debt merely, an extension of the time of payment of the mortgage by an agreement between the holder of it and the purchaser, without the concurrence of the mortgagor, discharges him from all liability upon it."

The doctrine as thus stated comports, we think, with true principles of equity and fair dealing to which parties ought always to be held. The question was presented in Calvo v. Davies, 73 N. Y. 211; s. c., 29 Am. Rep. 130, and was unequivocally decided in accordance with the rule as we have extracted it from Jones on Mortgages. In that case the court said, that in such a case as this we are considering, it must be held on the authorities that the rights of parties must be determined by the rules governing the relation of principal and surety. We find that decision to have been frequently followed in New York, and have discovered no case to the contrary in this country, except Corbett v. Waterman, 11 Iowa 86. The weight of authority is strongly in favor of the rule laid down in Calvo v. Davies, which we think adopts the truly equitable rule. It is very clear that after this arrangement between the appellant and Meredith, if Andrews and wife, who were the original debtors, had tendered the amount of the mortgage debt to the appellant and demanded an immediate assignment to them that they might enforce immediate payment, Meredith could not have complied, so as to enable them to proceed; nor could he have proceeded at once upon the demand of the appellees as the sureties of Meredith under the theory of the law as stated, for he had bound himself to wait for a definite period. It may be possible that

during that period such depreciation might take place as to create the deficiency.

The appellant complains that no injury in fact has been shown. The authority we have cited says that no inquiry will be made into that. The reason is that the law presumes a man to have been injured by such dealing to his possible, if not probable, prejudice. This is the doctrine of Claggett v. Salmon, 5 G. & J. 352, in which Judge STEPHEN says: "It is upon the principle that the contract is changed or varied to his prejudice, and without his consent, that the surety is discharged. It is because the creditor has disabled himself from fulfilling the duties and obligations which he owes to the surety, that he is released from his responsibility." In that case there was an express reservation of rights as against the surety, which under the circumstances of that case was upheld. But in this case there was no reservation of rights as against the surety, nor of right to proceed at the sureties' request, to throw any doubt upon the propriety of applying the general rule to this case. The doctrine that any dealing with the principal debtor whereby the contract is varied or changed operates to release the surety is also fully maintained and applied in Mayhew v. Boyd, 5 Md. 102; Yates v. Donaldson, id. 389, and Oberndorff v. Union Bank of Baltimore, 31 id. 126. * * * * * * * * * * * * *

It follows from what we have said, that the decree of the Circuit Court must be affirmed.

Decree affirmed.

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b. It has been held in some states that joint obligors cannot by agreement between themselves, and without the consent of their creditors, so change their relation to the debt as to change the creditor's rights.

RAWSON v. TAYLOR. 1876.

30 Ohio State 389; 27 Am. Rep. 464.

JOHNSON, J. The note sued on was the joint liability of all the partners in the firm of Taylor, Griswold & Co.

Taylor and Finger, as well as Griswold, were principal debtors.

When the note was executed and delivered to Mrs. Rawson, for a valuable consideration, the liability thereon of each partner

became fixed. Their relations to that contract, and their liabilities thereon, could by no act between themselves be changed.

After this note was given, two of the partners, Taylor and Finger, retired from the firm, and a new one was formed, including Griswold, their former partner, which obligated itself to the retiring partners to pay all debts, and save them harmless.

Of this arrangement, it is claimed that Mrs. Rawson had notice. The evidence tends to show constructive notice to her of the formation of the new partnership to succeed Taylor, Griswold & Co., and subsequent dealings by her with the new firm. Whether she ever in fact knew of this arrangement, by which the new firm was to pay the debts of the old, does not appear, but, conceding that she did, the question presented by the charge of the court is, as to the effect of such knowledge on her rights on the note.

The charge was: "If she did have notice, then she was, after that knowledge, bound to treat them as sureties, and they were entitled to all the protection that sureties would be entitled to, as if the names of Taylor and Finger had been attached as sureties when the note was executed."

It is not claimed that Mrs. Rawson assented to this new arrangement, or by any valid contract, express or implied, agreed to modify or change the relations of these joint obligors to her upon the note, but simply, as between themselves, by the new arrangement, Taylor and Finger became sureties of their copartner, Griswold, of which fact Mrs. Rawson had notice. It is admitted that so long as she was not informed of this arrangement her rights and duties remained as fixed when the note was given; but it is claimed that when such notice was given, then Taylor and Finger were entitled to the same rights and protection as if they had been originally sureties.

In substance, the charge of the court lays down the law to be, that the liability of principals on an obligation may be converted into a liability of suretyship by the acts of the obligors, without the assent of the obligee, by giving notice of such new arrangement.

In Thurston & Hays v. Ludwig, 6 Ohio St. 1, it was held that in order to change or vary the terms of a written contract, there must be a new contract to that effect between the parties, based on some new consideration, or such new contract must have been so far executed or acted upon that a refusal to carry it out would operate as a fraud.

Such is the general rule governing all contracts. In its application to cases like the one at bar, STORY says: "It frequently happens that upon the retirement of one partner, the remaining partners undertake to pay the debts and to secure the credits of the firm. This is a mere matter of private arrangement and agreement between the partners, and can in no respect be admitted to vary the rights of existing creditors of the firm." Story on Partnership, sec. 154.

If the creditor assents to such arrangement after it becomes known to him, "and by his subsequent act or conduct, or binding contract, he agrees to consider the remaining partners as his exclusive debtors, he may lose all right and claim against the retiring partner."

The precise question at bar was considered at great length in Maingay v. Lewis, Irish R. Com. Law, 495 (1869).

To an action on the money counts, the defendant pleaded that the cause of action accrued against him and one W. and one S. as partners; that afterward the firm was dissolved by a memorandum, of which plaintiff had due notice, by which W. agreed to pay all debts of the firm and indemnify his copartners from all claims, by which he became a surety only, of which plaintiff had notice, and after such notice took a bill of exchange at three months from W. alone for the amount, and thereby gave time to W., whereby defendant was discharged from liability. It was held that this plea was bad, and did not constitute a defense either at law or in equity, WHITESIDE, C. J., saying: "It is clear that no arrangement among joint debtors could prejudice the rights of their creditors." Again: "Another averment is that the plaintiffs 'had notice of this arrangement.' Well, I do not see how the men giving notice to the plaintiff of an arrangement by which they can not be affected, is to prejudice their rights."

In that opinion the distinction is clearly drawn between a case where the relation of principal and surety existed *inter se* at the time the obligation was entered into, of which the creditor had knowledge, and a case of joint principals *inter se* at the date of the obligation, and a subsequent agreement between the joint debtors, by which, as between themselves, one becomes a surety of the other, of which subsequent arrangement, the creditor had knowledge.

It is of the first importance to keep in mind the distinction, as it furnishes the key to harmonize many apparently conflicting

decisions. In the former class of cases, the relation of suretyship exists at the very inception of the contract. The obligee having knowledge of that relation before he accepts the contract, takes it subject to all the rights and equities of such sureties *inter se* not inconsistent with the terms of the contract.

On the other hand, where the obligors are in fact joint debtors, he accepts them as such, and no subsequent arrangements between the joint debtors alone can change that relation. Bedford v. Deakin, 2 B. & Ald. 210; Evans v. Drummond, 4 Esp. 89; Pooley v. Harradine, 7 E. & B. 431; Butler et al. v. Berkey, 13 Ohio St. 523; Parsons on Part. 421-425, ch. 13; Manley v. Boycott, 75 E. C. L. 45.

We may concede that such an agreement between remaining and retiring partners, with notice to a partnership creditor, would impose upon him the duty of acting in good faith and with reasonable diligence in the management of securities placed in his hands for the payment of his claim, in the preservation of liens, and in the application of payments made.

A failure by the creditor, after such notice, to perform these duties, resulting in damages to the retiring partner, might well be regarded in a court of equity as cause to release him.

In such case the terms of the contract have not been changed, but the fact that new relations had arisen between the partners, by which one assumes, as between them, the burdens of all, might well call upon the creditor to act in such way as not to injure the retiring partners. Eq. Lead. Cases, pt. 11, p. 1902.

In such cases it has been held, that if the creditor should give up securities in his hands, and take those of the new firm, or give long credit for additional interest or new security, or release a levy made, without the consent of the retiring partner, then in all such cases the retiring partner will be discharged. Story on Part., sec. 158 *et seq.;* Parsons on Part. 421 *et seq.;* Colyer on Part. 554-570; Harris v. Lindsay, 4 Wash. C. C. 271; Bedford v. Deakin, 2 Barn. & Ald. 210.

An examination of the cases in support of the doctrine of the text-books fails to support the charge of the court below. Upon both reason and authority, therefore, we conclude that as Mrs. Rawson was not a party to this new contract between the partners, by which the new firm assumed the debts of the old, and had never assented thereto or agreed to be bound thereby, her

rights on the promissory note, to regard all as principals, have not been altered or impaired.

These principles are aptly illustrated by the case before us.

By the several mortgages the claim of Mrs. Rawson was amply provided for.

Dudley, as the agent of the mortgagees, had sold sufficient property to pay them in full, and held the money the proceeds of such property, applicable to such payment. So much of this money as equalled the claim of Mrs. Rawson belonged to her. Had she, without the consent of these retiring partners, and with full knowledge of her rights, surrendered it back to E. R. G. & Co., after notice that they were the principal debtors, and thus have thrown the burden on these defendants, equity might well treat them as discharged.

In this case, it is not clear that Mrs. Rawson had full knowledge of all the facts, and it is clear that Taylor and Finger consented to the surrender of the money then in Dudley's hands. Had it been distributed, the debt would have been satisfied. The reason why it was not so applied by Dudley is disclosed in the bill of exceptions.

F. R. Griswold & Co. had succeeded in compromising with their general creditors, and had obtained their consent to a return to the firm of the unsold goods then in the hands of Wyman, the assignee.

They also desired to get possession of the money in the hands of Dudley. To do this, they must have the assent of all the mortgagees who were entitled to receive their proportions of that fund. Taylor and Finger were among the mortgagees whose assent was necessary.

To secure such assent, a paper was drawn up and signed by all the parties interested in the funds. Taylor and Finger assented. They are first to sign this paper, thereby recommending the others to do the same. Mrs. Rawson, seeing their names to it, was influenced to sign among the last. Taylor and Finger took good care, however, to insist on a private arrangement, in fraud of the rights of the other creditors, by which they received their share of these moneys, unknown to Mrs. Rawson.

We think the court erred in saying that their signatures to this paper operated only as to their individual interest in the fund.

The avowed object of this paper was "to promote a settlement of the affairs and business of the firm of E. R. Griswold & Co."

All had to sign to make the scheme operative. The object was to reinstate the embarrassed firm in business.

It may be that if part only had signed, the trustee might have paid the others their share, and returned back to E. R. G. & Co. the shares of the assenting parties, yet it is quite evident that the paper, which all in fact signed, was an express assent of each; that Dudley was authorized to return to the firm, not only his own share of the money, but also the shares of the other mortgagees. In short, Taylor and Finger assented to this arrangement as an entirety. They consented that Dudley should, instead of paying the debt to Mrs. Rawson, return the money to E. R. Griswold & Co., to enable them to resume business.

Taylor and Finger, by signing this paper, consented, not only that their share of the money should be returned to E. R. G. & Co., but also consented that Mrs. Rawson should do the same. They said to her: We are willing, in order to promote a settlement by our principals, and enable them to start again in business, that you shall still hold our note unpaid, and return to them the money in Dudley's hands applicable to its payment. In Woodcock v. Oxford and Worcester Railway Co., 1 Drew 521, D. and S. were sureties of A., B., and C. A. and B. retired, and F. was substituted. Subsequently, disputes arose between the new firm of C. & F. and the company with which the old firm had contracted, on which contract D. & S. were the sureties.

The sureties were not parties to the transactions growing out of these disputes, but acted as the solicitors of the new firm, and prepared many of the documents by which the original contract was varied. It was held that the sureties were not discharged by reason of these changes, because, with full knowledge of the facts, they assisted as solicitors in carrying into effect the arrangements of which they complain. These defendants, having signed this paper, thereby consented and recommended that all the other mortgagees do the same. This consent bars their present defense.

III. It is also claimed by the defendant that the receipt of interest on the 15th of November, 1867, to the 17th of the same month was such a giving of time as discharged the defendants.

The authorities cited and the conclusions reached on the first point disposes of this.

As these defendants were still jointly liable on the note as partners, the mere payment of interest by one jointly liable with them for a time in advance, would not discharge them, even if we concede that such payment, by operation of law, extended the time on the note.

Judgment of common pleas reversed and cause remanded.

WHITE v. BOONE. 1888.

71 Tex. 712; 12 S. W. Rep. 51.

Commissioners' decision. Appeal from district court, Montague county; F. E. Piner, Judge.

Action by Mary A. Boone and others against White, Barefoot & Bryant, as co-partners, for the balance due for rent of certain land leased by them for three years for pasturage. Judgment was rendered for plaintiffs, and defendants appeal.

COLLARD, J. The questions in this case arise upon the following state of facts: Mrs. Mary A. Boone, owning a one-half undivided interest in pasture lands in Clay county, leased the same on the 16th of April, 1883, to White, Barefoot & Bryant, partners in cattle business, at $2,496 per year, for three years, one-half of which was to be paid at the beginning of the year, and the remainder at the end of the year. Cash payments were made along, but at the end of the first year there was due $1,896. In July or August, 1883, White sold out to the other partners, who assumed all the liabilities of the business, and ran the same under the style of Barefoot & Bryant. Barefoot made all the negotiations with Mrs. Boone, who was his relative. At the end of the year he came to Mrs. Boone, estimated the amount then due for the first year, and gave her the note of the new firm for the same; not having the money to pay it. Mrs. Boone was not able to state whether she knew at the time that White was out of the firm, but the fact and terms of dissolution had been published in the papers. At the time the note was given nothing was said about White; no agreement was made as to him, and no release given. The note of Barefoot & Bryant was given merely for the balance due at the end of the first year. She says that she took it as collateral, but Barefoot testifies that nothing was said about its being collateral. At the end of the

second year Barefoot informed her that they could not keep the pasture for the full term of the lease, because they were not able to pay for it,—asked her to take it back, which she did, and rented it to another person. White testified that Mrs. Boone came to his store after she had taken the pasture back, and before the suit was brought, and asked him to tell her how she could get her money out of Barefoot & Bryant, and asked him to assist her, and said nothing about his paying the money. Mrs. Boone denied the fact in her testimony. In all, before suit, there had been paid on the contract $2,548. Under these circumstances, White claims that the taking of the note from Barefoot & Bryant changed the original contract, and released him from all liability on it. A retiring partner is not discharged from existing liabilities of the copartnership, nor from any unexpired lease made before retirement. The fact that the remaining partners have agreed with him to pay the debts and exonerate him from all liabilities upon a lease or other executory contract, would not affect the rights of the lessor. Such an agreement would be binding between the partners themselves only, unless creditors became parties to the agreement for a consideration. Upon this subject we adopt the language and principles stated by Mr. Parsons in his work on Partnership, page 458, as follows: "It is said the adequacy of consideration cannot be inquired into. And if a creditor of a firm contracts or agrees with a new firm to take their security in discharge of the old, the retiring partner is discharged from any liability to pay the debt, and whether such an agreement has taken place is a question of fact for the jury. To discharge a retiring partner, however, it is not sufficient to take a new security, but there must be an agreement to discharge him from the liability of the old firm." See, also, side page on 417. Id. There is no pretense that Mrs. Boone agreed or made any contract to discharge White when she took the note. The undisputed evidence is, there was nothing said about it. The fact that she subsequently took the pasture back when the new firm informed her they were unable to keep it, could not affect the case. She does not sue for the third year's rent. White was bound upon the contract for the whole time it was in use, and until it was surrendered to her by her consent. The judgment of the court was correct, and ought to be affirmed.

STAYTON, C. J. Opinion adopted November 13, 1888.

SHAPLEIGH HARDWARE CO. v. WELLS. 1896.

90 Texas 110; 59 Am. St. Rep. 783; 37 S. W. Rep. 411.

BROWN, J. The court of civil appeals for the second supreme judicial district has certified to this court the following statement and question:

"Appellant sued appellees upon a debt for merchandise contracted by them while engaged in a mercantile business under the firm name of Wells & Chestnut. While so indebted the firm was dissolved by mutual consent, Chestnut purchasing the interest of Wells and assuming the liabilities of the concern. Thereupon Wells notified appellant of this fact, and requested that he be released, and, upon this being refused, requested, as claimed by him, that suit be brought against Chestnut as provided in articles 3660 and 3661 of Sayles' Statutes, but this was not done.

"The material question in the case, which we deem it proper to certify to your honors for decision, is this: Can one of two or more principal debtors, by agreement among themselves without the consent of the creditor, so change the character of his liability to such creditor from principal to surety as to make available to him the provisions of the articles above referred to? Or, in other words, did Wells, after notice to Shapleigh Hardware Company of the arrangement whereby Chestnut was to pay the debt, occupy the relation of surety thereon, so as to entitle him to the remedy and rights provided in the foregoing articles?"

There is some conflict of authority upon the question presented for our consideration. We think that the weight of authority and sound reasoning support the proposition that one of two or more principal debtors cannot, by agreement with his codebtor or debtors, without consent of the creditor, so change the character of his liability from principal to surety as to entitle him from the creditor to the treatment and protection of a surety for the debt. In support of this position we cite the following authorities: Parsons on Partnership, 3d ed., 428; 1 Lindley on Partnership, 245; 1 Bates on Partnership, sec. 533, *et seq.;* Story on Partnership, sec. 158; White v. Boone, 71 Tex. 712; Shepherd v. May, 115 U. S. 505; Whittier v. Gould, 8 Watts 485; Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep.

464; Wadhams v. Page, 1 Wash. 420; Skinner v. Hitt, 32 Mo. App. 409; Barnes v. Boyers, 34 W. Va. 304; Swire v. Redman, L. R. 1 Q. B. Div. 536; Hall v. Jones, 56 Ala. 493.

As supporting the contrary doctrine we cite the following: Brandt on Suretyship and Guaranty, sec. 36; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Smith v. Sheldon, 35 Mich. 49, 24 Am. Rep. 529; Campbell v. Floyd, 153 Pa. St. 84; Williams v. Boyd, 75 Ind. 286; Gates v. Hughes, 44 Wis. 332.

In the case of White v. Boone, 71 Tex. 712, cited above, which involved very much the same state of facts as in the case submitted, Judge Collard said: "A retiring partner is not discharged from existing liabilities of the copartnership nor for any unexpired lease made before retirement. The fact that the remaining partners have agreed with him to pay the debts and exonerate him from all liabilities upon a lease or other executory contract would not affect the rights of the lessor. Such an agreement would be binding between the partners themselves only, unless creditors became parties to the agreement for a consideration."

The opinion in that case, which was approved by the supreme court, covers every material point involved in the question certified, and in our judgment established the precedent in our State in accordance with the weight of authority.

If it were necessary to adduce reasons in support of the position taken upon this question, we could do no better than to quote from the opinion delivered by Judge Stone in the case of Hall v. Jones, 56 Ala. 493, the following language: "When the goods were consigned by Hall & Long to Hannon, Brown & Jones, and received by them as commission merchants, this constituted a contract binding on each of the partners composing the latter firm to account for the goods or their proceeds. Such liability could not be canceled by any act of the latter firm alone or by any agreement its different members might make among themselves in which Hall & Long did not concur. It requires the same mutuality to vary or modify a contract as it does to create it in the first instance. The modification is only a species of contract." This doctrine that a contract when once made cannot be unmade without consent of both parties thereto, is so evidently sound, just and correct, that no argument is required to sustain it.

The leading cases in America which support the opposite view

of this question are Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90, and Smith v. Sheldon, 35 Mich. 49, 24 Am. Rep. 529, both hereinbefore cited. Both of these cases rest upon the authority of Oakely v. Pasheller, 4 Clark & F. 207. In the former case Judge FOLGER, of the supreme court of New York, after stating the proposition that an agreement between two partners upon dissolution that one should pay all the debts of the firm constituted the retiring partner surety of the other as between themselves, continues in this language: "When it was made known to Colgrove by Tallman that Barnes & Tallman had gone into the bargain which was thus made between them, Colgrove became bound to Tallman in equity to observe it." Thus he assumes the only proposition in controversy in the case—that is, that the agreement of the partners made between themselves, without consent of the creditor, imposed upon the latter the obligation to protect the rights of Colgrove as a surety for his codebtor. In support of this assumption he cites the case of Oakely v. Pasheller, 4 Clark & F. 207.

In the case of Smith v. Sheldon, 35 Mich. 49, 24 Am. Rep. 529, Chief Justice COOLEY undertakes to reason to the conclusion that such agreement would have the effect to change the contract without the consent of the creditor. He first lays down the correct rule, that as between themselves the retiring partner became a surety for the other partner. Also another proposition to the effect that if a contract be made by two or more persons as joint obligors therein, but it does not appear from the face of the writing that one of them is surety for the others, and if it be not known to the obligee in the contract that such is the case, then all the obligors will be regarded as principals in so far as it affects the obligee until the fact of suretyship is made known to him, after which he must observe the rights of the surety in his dealings with the principal in the contract. The learned judge then proceeds to reason that because, under such circumstances, the fact of suretyship being made known to the creditor imposed upon him the obligation to treat the surety as such from the time the information is received, it follows that the principal obligors in a contract may, by agreement between themselves, change the obligation of one or more from that of principal debtor to that of surety, and upon notice of such agreement to the obligee the same effect will be given as if the suretyship originated in the contract itself. This is evidently unsound

reasoning. In the first case stated, the contract was made by the party as a surety, but he was deprived of the protection given to a surety by the law, because the payee was an innocent holder of it for value without notice of his rights as surety, and, upon notice being given, the character of the creditor as innocent holder ceased, and the terms of the contract became operative and in full effect as to all the parties; while in the case decided by Judge Cooley he gave to the action of the parties this effect, that the original contract was in the first instance on the part of all the debtors made as principals and so accepted by the creditor, but subsequently, by an agreement between the debtors themselves, without consent being given on the part of the creditor, the contract was changed and a new one made between the debtors, by which the creditor is charged with the duty of taking care of the interests of one of the principal debtors as surety. In the former case, the effect of notice to the creditor does not change the contract, but removes the legal impediment to enforcing its terms; in the latter, notice to the creditor is given the effect of changing the terms of his contract without his consent and over his protests. The doctrine asserted as to the rights of the surety, who contracted as such, after the suretyship was made known to the holder of the contract, is equitable in itself and consistent with sound legal principles; but the conclusion drawn therefrom, that one who contracts as a joint principal with others may, by agreement with his codebtors and without consent of the payee in the contract, change his relation to the creditor so as to impose new obligations upon him, is neither just nor sound as a matter of law. It is inconsistent with the fundamental and accepted principles which govern the subject of contracts, which require the agreement of the parties to make or change them. The doctrine announced in Smith v. Sheldon, 35 Mich. 49, 24 Am. Rep. 529, originated in a misunderstanding of the case of Oakely v. Pasheller, 4 Clark & F. 207, decided by the house of lords, Lord Lyndhurst delivering the opinion. An examination of the case will show that the opinion proceeds upon the assumption that the creditor in that case accepted the agreement as it was made between the parties, receiving into the partnership his son-in-law as a new debtor and converting one of the partners from a principal debtor into that of surety for the new firm. During the argument by the attorneys who were asserting the proposition that Judge Cooley

Incorrect Statement
(1894) A.C. 586.

announced in his decision of the case cited above, Lord Lyndhurst said, "Can you cite any authority to the effect that two original principal debtors could, by an arrangement among themselves, convert one into a surety only for the other principal debtor?" To which the counsel replied, "The letters and accounts and all the circumstances of this case make it quite clear that Sir C. Oakely accepted Reid & Kynaston as principal debtors looking to Sherard's executors as sureties." In the opinion, Lord Lyndhurst does not refer to the question of consent or not, but assumes that Sherard's estate had become surety for the new firm, and the whole tenor of the opinion shows that it was based upon the fact that the agreement made between the partners themselves and the new partner was accepted by the creditor. This is the construction placed upon the opinion by Cockburn, chief justice, in Swire v. Redman, L. R. 1 Q. B. Div. 536.

It is said by the chief justice in Swire v. Redman, L. R. 1 Q. B. Div. 536, that there is no English case which holds the doctrine that is contended for by those who claim that the agreement between the partners themselves without the consent of the creditor could change their relations to the latter, and we have found no decisions in the American courts which directly hold to that theory, except those we have herein cited, all of which rest upon the misinterpretation of Oakely v. Pasheller, 4 Clark & F. 207.

We therefore answer that one of two or more principal debtors cannot, by agreement among themselves, without consent of the creditor, so change the character of his liability to such creditor from principal to surety as to entitle him to the benefits of the provisions of the article of the Revised Statutes referred to. Under the facts stated, Wells did not become the surety of Chestnut in so far as it affected the rights of the Shapleigh Hardware Company, by the agreement made between the partners without consent of the creditor.

End.

c. In other states it has been held that joint obligors may by agreement between themselves and without the consent of the creditor, make some principals and others sureties, and by notice to their creditor compel him to treat them as such and protect the rights of those who become sureties.

COLGROVE v. TALLMAN. 1876.

67 N. Y. 95; 23 Am. Rep. 90.

Appeal from order of the General Term of the Supreme Court, in the fourth judicial department, reversing a judgment in favor of plaintiff, entered upon the report of a referee, and granting a new trial. (Mem. of decision below, 5 Hun. 103.)

This was an action upon a promissory note, made by the firm of H. C. Barnes & Co., of which firm defendants were sole partners.

The note was given October 3, 1863, payable "fifteen days demand after date." About June 21, 1864, defendant, Tallman, sold out all his interest in the partnership property and effects to defendant Barnes, who agreed to assume and pay all the firm debts. A few days thereafter Tallman notified plaintiff, who then held the note, of the agreement, and requested him to proceed and collect the note, immediately. Barnes was, at the time, solvent and able to pay. He failed in 1866, made an assignment and was thereafter, up to the time of trial, hopelessly insolvent. Plaintiff made a demand in June, 1865, but made no effort to collect the note until after the failure.

Folger, J. By the dissolution of the copartnership, of which Barnes and Tallman were the members, and the transfer of all the property to Barnes, and his agreement with Tallman to pay all the debts of the firm; Tallman became in equity, as between himself and Barnes, a surety, for Barnes as principal debtor in those debts. (Millerd v. Thorn, 56 N. Y. 402; Savage v. Putnam, 32 id. 501; Kinney v. McCullough, 1 Sandf. Ch. R. 370; Morss v. Gleason, 64 N. Y. 204.)

When it was made known to Colgrove by Tallman, that Barnes and Tallman had gone into the bargain, which was thus made between them, Colgrove became bound to Tallman in equity to observe it. Thus, if he had made with Barnes, a valid agreement to extend the time of payment of the note made to him

by the firm, Tallman would have been discharged. (56 N. Y. *supra.*) This could be, only on the ground that extension of time of payment of a debt, granted by a creditor to a principal debtor, acts as a discharge of a surety of the debt, from his liability thereon.

It is recognized as resting upon this principle, in Oakley v. Pashelee (10 Bligh. New Par. R. 548). It was there argued for the creditor, that the doings of his debtors among themselves could not alter his rights, (page 580), and that a partner retiring, with an agreement for indemnity from his copartner, was not thereby converted into a surety, (page 581). But it was ruled that he was. The opinion given by Lord LYNDHURST, in the House of Lords, is: That the representatives of the retiring partner stood in the character of sureties (page 590), which the creditor was bound to observe, having had notice of the dealings between the partners, his original debtors; and see Morss v. Gleason (*supra*), as bearing upon this point. It is urged here, that the consent of the creditor is needed to create these new relations between him and his debtors; but the English case above cited does not make that a necessary fact. Nor are there lacking other instances in the law, wherein the action of third parties among themselves, has changed the relations of the creditor to them, without his assent thereto, and has created equities in favor of all or one of them, which he was bound to regard, and to refrain from injuring by his action or omission. Thus, if the equity of redemption of mortgaged premises is sold on execution by a judgment creditor of the mortgagor, and then the mortgagee, having also a bond for his debt, seeks to enforce it out of property of the mortgagor other than the lands mortgaged, he will either be stayed, or forced to make over the debt and security to the mortgagor, so that he may save himself out of the premises. (Per Kent, Ch., Tice v. Annin, 2 J. ch. 125-8; see a kindred case, Ferris v. Crawford, 2 Denio 595.) So, too, if a mortgagor conveys part of the mortgaged premises subject to the whole mortgage, the part sold is first liable for the debt, *i. e.*, it becomes the principal debtor; and the mortgagee must exhaust it before he can seek other property of the mortgagor, who has become in equity the surety. (Halsey v. Reed, 9 Paige 446.) And what comes close to this case in principle, and shows that a creditor must care for equities growing from new relations, arising out of changes made without his assent, is this:

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If several lots are mortgaged, and after that have come to different owners, and the mortgagee releases some of them, he may not enforce against those not released, more than a proportionate amount of the mortgage debt; the creditor, says the chancellor, owes a duty to his debtors, not to impair their rights as against each other. (Stevens v. Cooper, 1 J. Ch. 425.) This rule has been reiterated with the requirement that the creditor must have notice of the change sufficient to put him on inquiry. (Howard Ins. Co. v. Halsey, 8 N. Y. 271; and see Guion v. Knapp, 6 Paige 35; Stuyvesant v. Hall, 2 Barb. Ch. 151.) The reason is, that the parcels sold have become as sureties to the parcels not sold. The latter are as principals. A release of them is as a release of a principal debtor, which discharges the surety. To the same end is the rule, that a creditor having a lien upon two funds, will be forced, in favor of an after lienor having a claim upon one of the funds only, to seek his debt from the other fund. (Chesebrough v. Millard, 1 J. Ch. 409.) And if he does aught to prejudice the claim upon the one fund of the after lienor, after notice of the lien, he will to that extent be cut off from his own claim upon that fund.

In equity, then, the relations of the parties to this case, are that Barnes is the principal debtor, Tallman his surety for the payment of the debt, and Colgrove their creditor, of one as the principal debtor of the other as surety. These relations existed, as soon as Tallman gave notice to Colgrove, of the dissolution of the partnership and the agreement between him and Barnes. Each of them was, after that, affected by all the rules applicable to persons in those relations.

It is the settled law of this State, and one of the rules of the relations of creditor, principal debtor and surety, that the surety, while the principal is solvent and can be made to pay the debt, may require of the creditor that he collect it of the principal, and if the creditor refuses or neglects so to do, and the principal becomes insolvent and unable to pay, the creditor may not then have his debt of the surety; it is expressly so declared in Pain v. Packard (13 J. R. 174), King v. Baldwin (17 id. 384), Remsen v. Beekman (25 N. Y. 552); and treated as settled in Manchester Manufacturing Company v. Sweeting (10 Wend. 163); and though questioned, yet not denied in Warner v. Beardsley (8 Wend. 194) and Herrick v. Borst (4 Hill 650); limited in Trimble v. Thorne (16 J. R. 151), and

by ANDREWS, J., in Wells v. Mann (45 N. Y. 327), so as not to include indorsers and guarantors by independent collateral contract; and recognized by Church, Ch. J., in Hubbard v. Gurney (64 N. Y. 457).

And surely the reasons for the rule apply to the case in hand. We have shown that the relation of surety was created in Tallman. A surety is discharged in such case, because it is the duty of the creditor to obtain payment in the first instance of the principal debtor, and not of him who is surety; it is right that the principal should pay the debt; it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazard arising from a prolongation of the credit; and the creditor is under an equitable obligation to obtain payment from the principal, and not from the surety, unless the principal is unable to pay. (Per SPENCER, Ch. J., King v. Baldwin, *supra;* per WRIGHT, J., 25 N. Y., *supra.*) These reasons apply in full force here. Tallman had given up to Barnes, and put out of his own control all of the property of the firm, and had given Colgrove notice, and requested him to collect the debt. The facts of the case bring the parties within the rule above noticed, and set it in operation against the plaintiff.

Upon this ground, without considering any other question in the case, the order of the General Term should be affirmed and judgment absolute rendered against plaintiff on stipulation, with costs.

All concur.

Order affirmed and judgment accordingly.

SMITH v. SHELDEN. 1876.

35 Mich. 42; 24 Am. Rep. 529.

Action by Shelden against Smith and others, on a partnership indebtedness. The opinion states the case.

COOLEY, C. J. The legal questions in this case arise upon the following facts:

Prior to June, 1867, Eldad Smith, Isaac Place and Francis B. Owen were partners in trade under the firm name of Place, Smith & Owen, and as such became indebted to defendants in

error in the sum of nine hundred and sixty-nine dollars on book account.

In the month mentioned the firm was dissolved by mutual consent, Place purchasing the assets of his copartners and agreeing to pay off the partnership liabilities, including that to the defendants in error. On the second day of the following month Place informed the defendants in error of this arrangement, and that he had taken the assets and assumed the liabilities of the firm, and they, without the consent or knowledge of Smith and Owen, took from Place a note for the amount of the firm indebtedness to them, payable at one day, with ten per centum interest. They did not agree to receive this note in payment of the partnership indebtedness, but they kept it and continued their dealings with Place, who made payments upon it. The payments, however, did not keep down the interest. Place, in 1872, became insolvent and made an assignment, and Smith was then called upon to make payment of the note. This was the first notice he had that he was looked to for payment. On his declining to make payment, suit was brought on the original indebtedness and judgment recovered.

The position taken by the plaintiffs below was, that as they had never received payment of their bill for merchandise they were entitled to recover it of those who made the debt, the giving of the note which still remained unpaid being immaterial. On behalf of Smith it was contended that, by the arrangement between Place and his copartners, the latter, as between the three, became the principal debtor, and that from the time when the creditors were informed of this arrangement they were bound to regard Place as principal debtor and Smith and Owen as sureties, and that any dealing of the creditors with the principal to the injury of the sureties would have the effect to release them from liability. And it is further contended that the taking of the note from Place, and thereby giving him time, however short, was in law presumptively injurious.

Upon this state of facts the following questions have been argued in this court:

1. Was the note given by Place in the copartnership name for the copartnership indebtedness, but given after the dissolution, binding upon Smith and Owen?

2. If Smith and Owen were not bound by the note, were they entitled to the rights of sureties? And,

3. Did the taking of the note given by Place discharge Smith and Owen from their former liability?

On the first point it is argued in support of the judgment that when a partnership is dissolved the partner who is intrusted with the settlement of the concern should be held to have implied authority to give notes in settlement. On the other hand, it is insisted that in law he has no such authority, and that if he assumes, as was done in this case, to give a note in the partnership name, it will in law be his individual note only.

Whatever might be the case if the obligation which was given had been a mere acknowledgment of the amount due, in the form of a due-bill or I O U, we are satisfied that there is no good reason for recognizing in the partner who is to adjust the business of the concern any implied authority to execute such a note as was given in this case. This note was something more than a mere acknowledgment of indebtedness; and it bore interest at a large rate. It was in every respect a new contract. The liability of the parties upon their indebtedness would be increased by it if valid, and their rights might be seriously compromised by the execution of paper payable at a considerable time in the future if the partner intrusted with the adjustment of their concerns were authorized to make new contracts. It was assumed in F. & M. Bank v. Kercheval, 2 Mich. 506-519, that the law was well settled that no such implied authority existed, and we are not aware that this has before been questioned in this State. See Pennoyer v. David, 8 Mich. 407. We think it much safer to require express authority when such obligations are contemplated, than to leave one party at liberty to execute at discretion new contracts of this nature, which may postpone for an indefinite period the settlement of their concerns, when a settlement is the very purpose for which he is to act at all.

For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative position of the several parties as regards the partnership debt. Place, by the arrangement, had agreed to pay this debt, and as between himself and Smith and Owen, he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so and made collections from Smith and Owen, these parties would have been entitled to demand indemnity from Place. This we

believe to be a correct statement of the relative rights and obligations of all.

Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken, the relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the copartnership, seems to us unquestionable. It was then the duty of Place to pay this debt and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for that purpose, the duty of Place to indemnify, and the right of Smith and Owen to demand indemnity, were clear. Every element of suretyship is here present, as much as if, in contracting an original indebtedness, the contract itself had been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities of sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely have attempted no change in the law, but are entirely in harmony with older authorities which have only applied the like principle to different states of facts, where the relative position of the parties as regards the debt was precisely the same. We do not regard them as working any innovation whatever. The cases we particularly refer to are Oakeley v. Pasheller, 4 Cl. & Fin. 207; Wilson v. Lloyd, L. R., 16 Eq. Cas. 60; and Millerd v. Thorn, 56 N. Y. 402.

And it follows as a necessary result from what has been stated, that Smith and Owen were discharged by the arrangement made by the creditors with Place. They took his note on time, with knowledge that Place had become the principal debtor, and without the consent or knowledge of the sureties. They thereby endangered the security of the sureties, and as the event has proved, indulged Place until the security became of no value. True, they gave but very short time in the first instance; but, as was remarked by the vice-chancellor in Wilson v. Lloyd, L. R., 16 Eq. Cas. 60, 71, "the length of time makes no kind of difference." The time was the same in Fellows v. Prentiss, 3 Denio 512, where the surety was also held discharged. And see Okie v. Spencer, 2 Whart. 253. But that indulgence beyond the time fixed was contemplated when the note was given is manifest from the fact that it was made payable with interest. In a legal point of view this would be immaterial, but it has a bearing on the equities, and it shows that the creditors received or bargained for a consideration for the very indulgence which was granted, and which ended in the insolvency of Place. When they thus bargain for an advantage which the sureties are not to share with them, it is neither right nor lawful for them to turn over to the sureties all the risks. This is the legal view of such a transaction, and in most cases it works substantial justice.

The judgment must be reversed, with costs, and a new trial ordered.

The other justices concurred.

Judgment reversed.

UNION MUTUAL LIFE INS. CO. v. HANFORD. 1892.

143 U. S. 185; 12 Sup. Ct. Rep. 437; 36 L. Ed. 118.

Appeal from the circuit court of the United States for the northern district of Illinois. Affirmed.

Mr. Justice Gray. This was a bill in equity, filed March 30, 1878, by the Union Mutual Life Insurance Company, a corporation of Maine, against Philander C. Hanford, Orrin P. Chase, Frederick L. Fake, and Lucy D. Fake, his wife, citizens of Illinois, to foreclose by sale a mortgage of land in Chicago, and to obtain a decree for any balance due the plaintiff above the

proceeds of the sale. Fake and wife were defaulted, and Hanford and Chase answered. The case was heard upon a master's report, and the evidence taken before him, by which (so far as is material to be stated) it appeared to be as follows:

On September 9, 1870, Hanford and Chase mortgaged the land to one Schureman to secure the payment of three promissory notes of that date, signed by them, and payable to his order, one for $5,000, in one year, and the second for $5,000, in two years, each with interest at the rate of 8 per cent annually, and the third for $6,000, in three years, with interest at the rate of 10 per cent annually.

On January 30, 1871, (the first note having been paid,) the plaintiff, through one Boone, its financial agent, bought the mortgage, and Schureman indorsed the remaining notes, and assigned the mortgage to plaintiff.

On September 9, 1872, Hanford and Chase conveyed the land to Mrs. Fake by deed of warranty, "with the exception of and subject to" the mortgage, (describing it,) "which said mortgage or trust-deed, and the notes for which the same is collateral security," (describing them,) "it is hereby expressly agreed shall be assumed, and paid by the party of the second part, and, when paid, are to be delivered, fully canceled, to said Chase and Hanford."

At or about the date of this conveyance, Chase called with Fake at Boone's office, and told him that Hanford and Chase had sold the property to Mrs. Fake, and that she was to pay the mortgage, and Boone, as Chase testified, "said, 'All right,' or something of that sort." At the same interview, Boone, as the plaintiff's agent, in consideration of $150 paid him by Chase, extended the $5,000 note until September 9, 1874.

Fake, as his wife's agent, afterwards paid interest on the notes to Boone, as the plaintiff's agent; and on January 9, 1875, for the sum of $340, obtained from him, without the knowledge of Hanford or Chase, an extension of the notes until September 9, 1875.

The value of the mortgaged premises in September, 1874, was $18,000 to $19,000, and at the date of the master's report, in April, 1879, was $10,000 to $15,000 only.

The principal defense relied on by Hanford and Chase was that they were discharged from personal liability on the notes by this extension of the time of payment without their consent.

The land was sold by the master, under order of the court, for $12,000, which was insufficient to satisfy the sums due on the mortgage; and the plaintiff, after notice to Hanford and Chase, moved for a deficiency decree for a sum amounting, with interest, to more than $5,000. The circuit court overruled the motion. 27 Fed. Rep. 588. The plaintiff appealed to this court.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

Few things have been the subject of more difference of opinion and conflict of decision than the nature and extent of the right of a mortgagee of real estate against a subsequent grantee, who by the terms of the conveyance to him agrees to assume and pay the mortgage.

All agree that the grantee is liable to the grantor, and that, as between them, the grantee is the principal, and the grantor is the surety, for the payment of the mortgage debt. The chief diversity of opinion has been upon the question whether the grantee does or does not assume any direct liability to the mortgagee.

By the settled law of this court, the grantee is not directly liable to the mortgagee at law or in equity; and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt. Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. Rep. 494; Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. Rep. 831. In that view of the law there might be difficulties in the way of holding that a person who was under no direct liability to the mortgagee was his principal debtor, and that the only person who was directly liable to him was chargeable as a surety only, and consequently that the mortgagee, by giving time to the person not directly and primarily liable to him, would discharge the only person who was thus liable. Shepherd v. May, 115 U. S. 505, 511, 6 Sup. Ct. Rep. 119; Keller v. Ashford, 133 U. S. 610, 625, 10 Sup. Ct. Rep. 494. But the case at bar does not present itself in that aspect.

The question whether the remedy of the mortgagee against the grantee is at law and in his own right, or in equity and in the right of the mortgagor only, is, as was adjudged in Willard v. Wood, above cited, to be determined by the law of the place

where the suit is brought. By the law of Illinois, where the present action was brought, as by the law of New York, and of some other states, the mortgagee may sue at law a grantee, who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt. Dean v. Walker, 107 Ill. 540, 545, 550; Thompson v. Dearborn, Id. 87, 92; Bay v. Williams, 112 Ill. 91; Burr v. Beers, 24 N. Y. 178; Thorp v. Coal Co., 48 N. Y. 253. According to that view, the grantee, as soon as the mortgagee knows of the arrangement, becomes directly and primarily liable to the mortgagee for the debt for which the mortgagor was already liable to the latter; and the relation of the grantee and the grantor towards the mortgagee, as well as between themselves, is thenceforth that of principal and surety for the payment of the mortgage debt. Where such is held to be the relation of the parties, the consequence must follow that any subsequent agreement of the mortgagee with the grantee, without the assent of the grantor, extending the time of payment of the mortgage debt, discharges the grantor from all personal liability for that debt. Calvo v. Davies, 73 N. Y. 211; Bank v. Estate of Waterman, 134 Ill. 461, 467, 29 N. E. Rep. 503.

The case is thus brought within the well settled and familiar rule that if a creditor, by positive contract with the principal debtor, and without the consent of the surety, extends the time of payment by the principal debtor, he thereby discharges the surety; because the creditor, by so giving time to the principal, puts it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, and because the surety cannot have the same remedy against the principal as he would have had under the original contract; and it is for the surety alone to judge whether his position is altered for the worse. 1 Spence Eq. Jur. 638; Samuell v. Howarth, 3 Mer. 272; Miller v. Stewart, 9 Wheat. 680, 703. The rule applies whenever the creditor gives time to the principal, knowing of the relation of principal and surety, although he did not know of that relation at the time of the original contract, (Ewin v. Lancaster, 6 Best & S. 571; Financial Corp. v. Overend, L. R. 7 Ch. App. 142, and L. R. 7 H. L. 348; Wheat. v. Kendall, 6 N. H. 504; Guild v. Butler, 127 Mass. 386); or even if that relation has been created since that time, (Oakeley v. Pasheller,

4 Clark & F. 207, 233, 10 Bligh N. S. 548, 590; Colgrove v. Tallman, 67 N. Y. 95; Smith v. Shelden, 35 Mich. 42).

In the case at bar, the mortgagee, immediately after the absolute conveyance by the mortgagors, was informed of and assented to that conveyance and the agreement of the grantee to pay the mortgage debt, and afterwards received interest on the debt from the grantee; and the subsequent agreement by which the mortgagee, in consideration of the payment of a sum of money by the grantee, extended the time of payment of the debt, was made without the knowledge or assent of the mortgagors. Under the law of Illinois, which governs this case, the mortgagors were thereby discharged from all personal liability on the notes, and the circuit court rightly refused to enter a deficiency decree against them.

Decree affirmed.

Editorial Note.

It will be observed that the last two rules are the exact opposites of each other, and the cases that support them are directly in conflict. This doubtless arises from the supposed conflict of two well-settled principles of jurisprudence. By one principle a party to a contract may rely upon and enforce his contract in the exact form in which he originally made it, and his debtors may not, by any arrangement between themselves to which he does not consent, impair his contract or restrict his rights under it. By another principle a creditor, while entitled to enforce his contract, must yet do so in such a manner as not to needlessly sacrifice the rights of others, even though such others may be strangers to his contract. Thus if a creditor holds a mortgage on two pieces of property and his mortgagor sells one of them, the purchaser can compel the creditor to exhaust the remaining piece before going upon that sold. And this is done even though the creditor may not have consented to the sale. Also if a creditor has a lien on two funds and another creditor has a subsequent lien on but one of them, the latter can compel the first creditor to exhaust the fund on which the second has no lien in order to save the other, if possible, for him. This does not deprive the creditor of any substantial right, because, if necessary, all the security must go to pay the first debt, but it does compel the first creditor to regard the rights of the

second, even though by his contract he might be free to take his own course as to the order in which he would exhaust the funds. Those courts therefore that have emphasized the sacred character of the contract have been led to the conclusion that, inasmuch as by the original contract the obligors were all principals and the creditor might lawfully arrange with any of them to extend time of payment, he can not be restricted in this right by any subsequent arrangement to which he does not consent. Those courts, on the other hand, that have emphasized the equitable principles above referred to, have been led to the conclusion that while the creditor may rely on the exact terms of his contract and enforce his original contract exactly as he has made it, yet, after he has knowledge that his obligors by an arrangement between themselves have become part principals and part sureties, he can not thereafter make a new contract with such principals in disregard of the rights of those who have now become sureties. By the extension of time he is not enforcing the original contract but making a new one, and in doing so he must regard the rights of others that have intervened since the making of his original contract, even though he has never given his consent to the arrangement that has created these rights.

In this situation two great principles of the law seem to come into conflict, and one will be inclined to the one or to the other view as he may be inclined to lay special stress upon the one or the other principle. It is difficult to answer the argument of Judge Folger in Colgrove v. Tallman, *supra*, and Judge Cooley in Smith v. Sheldon, *supra*, although it can hardly be said that they are supported by the greatest number of decided cases. Which will finally become the settled American doctrine on this question remains to be determined.

Those who care to follow this interesting inquiry further will find the following cases more or less in point:

Campbell v. Floyd, 153 Pa. St. 84, 25 Atl. Rep. 1033.
Williams v. Boyd, 74 Ind. 286.
Gates v. Hughes, 44 Wis. 332.
Shepherd v. May, 115 U. S. 505, 6 Sup. Ct. Rep. 119.
Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. Rep. 494.
Bank v. Kirkwood, 172 Ill. 563, 50 N. E. Rep. 219.
First National Bank v. Finck, 100 Wis. 446, 76 N. W. Rep. 608.

Shamburg v. Abbott, 112 Pa. St. 6, 4 Atl. Rep. 518.
Hall v. Jones, 56 Ala. 493.
Mullendore v. Wertz, 75 Ind. 431, 39 Am. Rep. 155.
Winston v. Taylor, 28 Mo. 82, 75 Am. Dec. 112.
Hahls v. Mayer, 22 Am. St. Rep. 763 and note thereto.
Davenport v. King, 63 Ind. 64.
Neel v. Harding, 2 Met. (Ky.) 247.

CHAPTER VIII.

EFFECT OF INDEMNITY.

a. A surety or guarantor who is indemnified by principal against loss does not have ordinary rights of a surety.

WILSON v. TEBBETTS. 1874.

29 Ark. 579.

Appeal from Pulaska Circuit Court. Hon. JOHN WHYTOCK, Circuit Judge.

WALKER, J. The question presented in the second instruction or ruling of the court, asked by plaintiff and refused by the court, distinctly presents the question as to whether the surety who takes from his principal debtor money or property, whether by pledge, mortgage, or by deed of trust, sufficient in value to indemnify him against loss by reason of his suretyship, and whilst the property or estate so remains in his hands, can resort to the statute notice to compel the creditor to proceed against the principal debtor.

In order to have a proper understanding of the question, it must be kept in mind that the right to redress, as between the principal and surety, is strictly equitable, and is to be determined upon principles of equity, whether proceeded upon in a court of law or equity. The liability of a surety, although direct as between himself and creditor, is contingent as between himself and his principal; he is allowed to interpose and hasten the collection of the debt only upon the ground that delay is hazardous to his rights. Although bound for its payment, it is not properly his debt, and where the principal debtor places money or conveys property of ample value to satisfy and pay the debt,

there remains no equitable ground upon which a claim to hasten the collection rests.

From the time the property or money passes into the hands of the sureties, the relations between the sureties and debtor change, in so far that they stand in the attitude of principal debtors. We think that the following adjudicated cases fully sustain us in this conclusion.

In the case of Chilton & Price v. Robbins, Paynter, etc., 4 Ala. 223, the creditor gave to his principal debtor time for payment, but without the knowledge or consent of the sureties. The sureties had obtained a deed of trust on the property of their principal to secure them from loss by reason of their suretyship. ORMAND, J., who delivered the opinion of the court, said: "The taking by the sureties of a deed of trust from the principal debtor to secure them against liability, and ample for that purpose is, in effect, an appropriation of the effects of the principal to the payment of his debt, and they will not therefore be permitted to urge that they are not responsible." The case of Moore v. Paine, 12 Wend. 123, is even stronger. There the principal debtor was discharged with the consent of the creditor. But the sureties, being fully indemnified by the debtor, were held to be liable to the creditor. NELSON, J., said: "It is true that a release of one of two or more obligors to a bond operates as a discharge to all; but the rule is provisional, and a discharge under the insolvent law has necessarily no such effect. . . . The generally acknowledged and familiar principle is, that when the creditor deals with his debtor so as to alter the rights of the sureties, or in any way impair their legal remedies against the principal, the sureties are discharged. . . . But it is obvious that this principle has no application to this case. The sureties received from the debtor the whole amount to become due on the bond in question, and after that as between him and them, they were the principals and owed the debt. The discharge of Fine, the principal, could in no possible way interfere with their rights or liabilities, so long as they held in their hands a complete indemnity against the bond, and he is not accountable to them if they are obliged to pay."

In the case before us, Van Horn's sureties had taken a deed of trust on property amply sufficient to pay the debt with the power to sell in twenty days. Such was the state of case when Gregg gave notice to Wilson to sue in thirty days. The statute

was not intended to be used to oppress the debtor; it was intended as a means of hastening the creditor in case the surety should be liable to loss by the insolvency of his principal. It appears from the evidence that this property remained for about eight years in the hands of the sureties, and near four years before it was rendered comparatively valueless by fire.

As a matter of public history we know that, for a part of that time, no sale could be effected on account of civil war.

If these sureties have equitable rights, they must arise out of their relations with Van Horn, and how far, if at all, after Van Horn had conveyed to them property of sufficient value to pay the debt, which they had permitted to remain unsold for several years, and until after the most valuable part of it had been destroyed by fire, is a question not free from doubt. Be this as it may, there was certainly no such contingent liability on the part of the sureties to loss after the deed of trust had been executed, or at the time Gregg gave notice to sue, as to entitle them to a discharge from such liability under the provisions of the statute, and it is error in the court below to refuse to declare the law as asked in the 2d proposition of plaintiff. From the conclusions at which we have arrived, none of the sureties were discharged, nor could they, by notice to sue, properly ask for a discharge whilst they held the property of Van Horn sufficient in value to pay the debt, in their hands.

We have not overlooked the fact that Gregg's name appears to have been omitted in the deed of trust, whether by accident in copying or otherwise, we have no means of ascertaining, according to the agreed state of facts upon which the case was submitted to the court below. It is stated that Van Horn made the deed of trust at the instance of his securities on the note of Wilson, for the indemnity of such sureties from loss, and the deed requires that the money for which the trust property should sell be paid in satisfaction of the debt, so that whether his name is omitted or not, the legal effect of the deed is as much a protection to him as to the other sureties, and as it is admitted that the property conveyed was of ample value to pay the whole debt, it must of necessity be an indemnity to all of them. If we had held Gregg to be discharged, it would have been proper for us to determine whether the securities who failed to give notice to sue, and were consequently not discharged, should be held responsible for the whole debt, or only for so much of it as they

would have been bound to pay had none of the sureties been discharged; but holding, as we do, that none of the sureties in this case were discharged, we will leave this question to be settled when it properly arises.

Let the judgment of the court below be reversed and the cause remanded.

HIDDEN v. BISHOP. 1857.

5 Rhode Island 29.

Assumpsit against the defendant as guarantor of a check for $2,000, dated October 18, and payable November 18, 1856, "to ———— or bearer," drawn by one Doyle on the Mercantile Bank of Providence, and discounted by the plaintiff. The case having been submitted to the court, under the statute, in fact as well as law, it appeared, in substance, that Doyle, having procured the defendant to indorse the check for his accommodation, under a representation that it was to be deposited with the plaintiff as collateral security for the payment of a note of P. Allen & Sons, for $2,114.10 at six months, and dated October 13, 1856, which the plaintiff had agreed to discount, on the day of the date of the check procured the same to be discounted by the plaintiff, at the same time depositing said note of P. Allen & Sons with the plaintiff, as collateral security for the payment of the check; that at the time of this transaction, no communication was had between the plaintiff and defendant, nor did Doyle inform the plaintiff, nor did it appear that the plaintiff at that time, nor until after the 18th of November, 1856, had any express notice that the defendant relied in any way upon the note of P. Allen & Sons for his protection as indorser of the check; that the plaintiff, having previously discounted other paper for Doyle to the amount of about $2,500, then overdue and unpaid, upon which the plaintiff's brother-in-law and two others were Doyle's accommodation indorsers, on the 17th of November, the day before the check fell due, (Doyle having stopped payment on the 5th,) by Doyle's direction, and at the request of his brother-in-law, and without communication with or procuring the assent of the defendant, changed the application of the collateral note from the check in suit, and afterwards

applied the proceeds of the same, when collected, to the other paper discounted by him for Doyle as aforesaid. It also appeared that about the 10th of November, Doyle applied to the defendant to allow the note of P. Allen & Sons to be applied to other paper than the check, the defendant having become apprised that the check had been discounted and the note deposited as collateral to it, and that the change of application requested was refused. There was no direct evidence, however, that this request and refusal was known to the plaintiff. The check was, at maturity, duly presented for payment, and there being no funds of Doyle in the Mercantile Bank, the bank refused payment, of which notice was given to the defendant, and this suit instituted against him as guarantor.

Ames, C. J. The equity which entitles a surety to the benefit of all securities of the principal deposited with the creditor to assure payment of the debt, is wholly independent of any contract between the surety and the creditor, and indeed of any knowledge on the part of the surety of the deposit of the securities. A striking illustration of this equity is afforded by the recent case of Lake v. Bruton, 39 Eng. L. & Eq. 443, 444; in which, there having been a contract for specific indemnity to the surety, it was contended, that upon the principle of "*expressio unius, exclusio alterius,*" he became disentitled to the benefit of certain other security deposited by the principal with the creditor, without the privity of the surety. The Lords Justices held, however, that for the very reason that the surety had no knowledge of the deposit, the above maxim could not apply to the construction of the surety's contract for specific indemnity; and, affirming the general equity, allowed him the full benefit of the other security deposited by his principal with the creditor without his knowledge. In such case, the creditor is regarded as a trustee of the security deposited with him, for the benefit of all parties known to him to be interested in it, and is bound to administer the trust created by the deposit, unless discharged by the surety, in his relief, as well as in accordance with his own interests and those of the principal. It follows, that any application of the security by the creditor to other purposes than those marked out by the terms of the deposit, or any decrease of its value by means of his negligence or mistake, discharges the surety from liability to him in that character, to the extent of the misapplication or decrease of

value thus occasioned. Matthew v. Crickett and others, 2 Swanst. 190, 191; Samuel v. Howarth, 3 Mer. 277, 278; Law v. The East India Company, 4 Ves. 824; 2 Am. Lead. Cases, Hare & Wallace's notes, 343 to 369, inclusive, for American cases.

The equities of a surety are administered by courts of law, so far as their remedial forms will permit, as well as by courts of equity; and applied, as they must be, to the decision of the case at bar, operate with great force to discharge the defendant as guarantor of the check here sued. The defendant is not only a surety, but became such, in the matter of this discount, upon the representation of his principal that the check was to be merely collateral to the note of P. Allen & Sons, which was for an amount exceeding it, and that he would thus be protected from any loss in consequence of his suretyship. The plaintiff was apprised of the character in which the defendant engaged himself to him, by the very form of his engagement, as well as by the fact, that the maker of the check procured and received the benefit of the discount; and, under the circumstances, might reasonably have presumed, what turns out to be true, that the defendant indorsed the check upon faith of being protected in some mode by the note of P. Allen & Sons. The application of the proceeds of that note by direction of the principal, and without the assent of the defendant, to other paper discounted by the plaintiff, and in relief of other sureties, one of them his near connection, was, far within the rule so well and wisely established for the protection of sureties, a clear breach of the trust created by the original deposit for the benefit of the defendant. As the note of P. Allen & Sons has been paid, and in amount exceeds the amount of this indorsement, the equities between these parties are perfectly administered by holding, as we do, the defendant discharged as guarantor.

Judgment for defendant.

SILVEY v. DOWELL. 1870.

53 Ill. 260.

Appeal from the Circuit Court of Mason county; the Hon Charles Turner, Judge, presiding.

Mr. Chief Justice Breese delivered the opinion of the court: This was a bill in chancery in the Mason circuit court, exhibited

by Joseph Silvey against George Dowell, John Welch, J. W. Stevenson and David B. Phelps, the sheriff, to enjoin proceedings on a *fi. fa.* issued on a judgment obtained by Stevenson against Dowell and Silvey, and which Stevenson had assigned to Dowell.

It appears from the record, that Dowell and Silvey were securities on a note which John Welch had executed to William Claypool for two hundred and fifty dollars, the price of certain personal property Welch had bought of Claypool; that by agreement between Welch, Dowell and appellant, Silvey, Welch was to execute a chattel mortgage to Dowell and Silvey on the property purchased, and some other property, as security to them, which he did execute; that soon after its execution, Dowell took possession of the property, and assumed the payment of Welch's note to Claypool; that Dowell paid one-half the note, and then procured Stevenson to buy the note of Claypool for his, Dowell's, benefit, he, Dowell, furnishing the money for that purpose. Stevenson bought the note, paying full value therefor, and had it assigned to himself, and brought an action thereon against Dowell and appellant, in his own name, and recovered a judgment against them for one hundred and forty-seven dollars nineteen cents and costs.

It is the execution issued on this judgment, and which was levied on appellant's personal property, that was sought to be enjoined.

Though the defendants, Dowell and Stevenson, in their answers to the bill, deny the facts above stated, yet they were abundantly proved by appellant, and by Stevenson himself, who was sworn and testified in the cause.

Had these facts been known to appellant, and presented as a defense to the action at law on the note, they could not have availed, for he was doubtless, liable on the note to the holder by assignment. But when, as it now appears, his co-defendant and co-maker of the note, Dowell, was the party beneficially interested in the note, and who had been put in funds by Welch, the principal debtor, sufficient to pay it, and had assumed to pay it, the injustice of the proceeding as against appellant, becomes manifest, and is so glaring as to require the interposition of a court of equity.

Dowell having received full indemnity himself, for becoming security for Welch, and having assumed the payment of the

note, which he was morally and equitably, if not legally bound to pay, it became his own debt, and for which appellant should not be responsible.

It is against equity and good conscience that he should be compelled to pay a debt which his co-surety assumed to pay himself, in consideration of funds having been placed in his hands for such purpose.

The case is too plain for argument. The bill of complainant should not have been dismissed. For the error in dismissing it, the decree must be reversed and the cause remanded.

Decree reversed.

CRIM v. FLEMING. 1884.

101 Ind. 154.

From the Hamilton Circuit Court.

ELLIOTT, J. The material averments of the first paragraph of the appellee's complaint may be thus summarized: On the 13th day of March, 1877, William Crim obtained judgment against Thomas J. Fleming as principal and the appellee as surety for $1,389.79. The principal debtor was the clerk of the county of Madison from October, 1870, to the 15th day of October, 1874, and there was due him as fees on the 12th day of April, 1878, $4,000. On that day these fees were by him assigned to Crim by the following written instrument: "For value received I hereby assign to William Crim, of Anderson, Indiana, all unpaid fees due me as the clerk of the Madison Circuit Court, as the same are taxed and charged upon the fee-records of said court, hereby authorizing said William Crim to receive and receipt for said fees as the same may be paid." This instrument was entered of record in the order-book of the Madison Circuit Court on the day it was executed. At the time the assignment was made the uncollected fees due Thomas J. Fleming were of the value of more than $2,000. The assignment was made as a security for the judgment on which the appellee was surety, and was accepted by the appellant as additional security for its payment. In 1880 the appellant assigned back to Thomas J. Fleming all the fees, and did it without the knowledge of the appellee.

The second paragraph differs from the first in this, that it does not aver that the fees were assigned back to Thomas J. Fleming. It does, however, aver that Crim received of the fees the sum of $471.53, and that he suffered Thomas J. Fleming to collect the fees to the amount of $500, and that Crim neglected to collect the remainder of the fees, and suffered those owing them to become insolvent. It is also averred that "The said assignment was made for a security on said judgment, and to be held and collected by said William Crim and paid on said judgment, and William Crim accepted the assignment of said fees as security on said judgment, and to collect and pay the same thereon." The insolvency of the assignor and principal debtor is also averred.

The release of securities held by the creditor releases the surety to the extent of the value of the securities released. The first paragraph of the complaint is good, for the reason that it shows the release of securities exceeding in value the amount of the debt due the creditor.

The second paragraph of the complaint is good, for the reason that it shows that the creditor undertook to collect the fees assigned to him, and that he negligently failed to do so. The complaint shows more than mere passiveness on the part of the creditor, for it shows that he permitted the principal debtor to collect the fees and appropriate them to his own use. It is quite clear that a creditor who receives from the principal debtor securities which he undertakes to collect and apply on the debt is guilty of positive negligence if he surrenders them to the principal debtor, and permits him to collect and appropriate the proceeds. Equity will not suffer the rights of the surety to be thus frittered away. There was here an express agreement to collect and apply the money to the payment of the debt, and it was a violation of this agreement to permit the principal debtor to regain possession of the securities and use them for his own benefit. The case falls within the rule, that "The surety is discharged where collateral securities held by the creditor from the principal debtor are voluntarily returned without the consent of the security, at least to the value of such collateral securities." Colebrooke Collateral Securities, 311, section 240.

The second paragraph of the answer alleges that the assignment was ineffective, because not entered on or attached to the

judgment-docket or fee-book. This theory can not be sustained. The assignment was an equitable one, and operated to vest in the assignee the equitable title, and this is sufficient. Burson v. Blair, 12 Ind. 371; Scobey v. Finton, 39 Ind. 275; Cravens v. Duncan, 55 Ind. 347; Adams v. Lee, 82 Ind. 587. The question here is, not as to the rights of the debtor, but as to the rights of the surety, and section 604 of the statute has no application whatever.

The complaint avers, and the answer admits, because the averment is not denied, that the fees were due the appellee's principal, and no question is presented as to his right to assign them.

The fourth paragraph of the answer purports to answer so much of the second paragraph of the complaint as seeks to recover for the fees and cost collected by Thomas J. Fleming, and it is alleged that the assignment was not entered on the judgment docket nor attached thereto; that the persons owing the fees paid them to Thomas J. Fleming without the knowledge of the appellant. We regard this paragraph as clearly bad. As the appellant had accepted the assignment and agreed to collect the fees, he was bound to take such steps as were reasonably necessary to make the assignment effective. "A creditor holding collateral securities is chargeable with a trust concerning the same for the benefit of the surety, where he has notice of the existence of such relation as between the parties to the note." Colebrooke Collateral Securities, section 239. When we add, as must be done in this case, to the duty created by law the duty created by the express agreement of the creditor to collect the collateral security assigned him, it seems clear that his failure to use reasonable diligence to make the security available should operate to release the surety. The effect of such an agreement, when combined with the general duty imposed by law, is to assure the surety that the creditor will do what is reasonably necessary to make the security effective, and that if there is a violation of the duty created by contract and by law, and consequent loss, the surety is discharged. The surety has a right to rely upon the creditor's agreement, and to permit the latter to disregard it, would operate to ensnare and mislead the former. We do not believe that a surety is bound to notify the creditor to keep his engagement, but do believe that the creditor must perform it without notice. We can perceive no reason for

discriminating such an agreement from any other, and we know of no principle that denies one contracting party compensation for a breach of a contract, because the other party was not prodded into performing it by notice. There is a stubborn conflict in the authorities as to the soundness of the doctrine, adopted in Philbrooke v. McEwen, 29 Ind. 347, that a creditor who accepts a mortgage as a collateral security does not release a surety by an omission to record it within the time required by law. Brandt Suretyship & Guaranty, sections 384, 385, 386, 387; Colebrooke Collateral Securities, section 241. But the case in hand is not within that rule, for here there was an express agreement to collect, and this makes an essential difference, for a breach of an agreement can not be justly regarded as inaction or passive neglect. In stating the rule declared by the authorities which support the doctrine of Philbrooks v. McEwen, *supra,* the author last referred to uses this language: "In the absence of an express agreement to use diligence, or of such special circumstances as to render prompt action of the creditor an absolute duty, the mere inaction or passive delay, or omission of the creditor to enforce the collection of collateral securities held by him from the principal debtor, is not sufficient of itself to discharge or release a surety from his obligation to pay the debt upon default." Colebrooke Collateral Securities, section 241. It is evident from this statement that the fact that there was an express agreement to collect the securities assigned by the creditor takes the case out of the general rule, for it adds a new element of controlling importance.

The seventh paragraph of the answer avers that Thomas J. Fleming fully paid to the plaintiff the whole of the judgment, principal, interest and costs, before the commencement of the suit. In our opinion this answer is good. If the surety had been paid the full amount for which he was liable, he could not be injured by any wrong or omission of the creditor. The money received by him from his principal indemnified him, and no matter what the creditor did with the collateral securities, he could lose nothing. The money received was his only as an indemnity, and if he should be compelled to use it in paying the creditor, he would lose nothing. Where a surety is indemnified by the principal, he is not released by any indulgence granted by the creditor, nor by any negligence on his part in regard to the collection of the collateral securities assigned to him by the

principal debtor. Story Eq. Juris. (10th ed.) section 502 b. The authorities upon this subject go very far, for it is said: "A surety who is fully indemnified is not discharged by the release of the principal. In such case the surety himself occupies the position of a principal." Brandt Suretyship & Guaranty, section 123. Payment to the surety by the principal is the most ample indemnity that could well be made, for, with the money in his hands, the surety is absolutely safe from loss, and no act that the creditor can do can injure him.

If, as the answer avers and the demurrer admits, the money was paid by the principal to the surety on the judgment, the only just claim that the latter can have to it is that which accrues to him in his character of surety, and in equity he really holds the money for the benefit of the creditor, to whom he occupies the position of a debtor. It is logically inconceivable that any acts of the creditor could cause him injury, for no additional burden or risk can be imposed on him while he has the money to pay the debt in his own hands.

It is too plain to be fairly debatable that the defence pleaded is not admissible under the general denial.

Judgment reversed.

CHAPTER IX.

RIGHTS OF SUCCESSIVE SURETIES FOR SAME DEBT.

a. Sureties becoming successively liable for same debt, by distinct contracts, are each and all liable to the creditor, but as between themselves the last is primarily liable for whole debt.

HINCKLEY v. KREITZ. 1874.

58 N. Y. 583.

Appeal from judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of plaintiff entered upon a verdict. (Reported below, 4 Jones & Spencer 413.)

This action was brought upon an undertaking executed by the defendants, as sureties, on an appeal to the General Term of the Court of Common Pleas, from a judgment entered in an action in said court in favor of one Frederick Dennstaedt, plaintiff, against Carl Anschurtz, defendant.

The undertaking was to the effect "that the said appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding $500; and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on the said appeal."

The judgment appealed from was affirmed by the General Term, and the defendant took a further appeal from such judgment of affirmance to the Court of Appeals, giving a new undertaking, with Johann P. Schuchman and Nicholas Müller as sureties. The Court of Appeals affirmed the judgment of the General Term, and remitted the record to the court below, where judgment upon the remittitur was duly entered. Dennstaedt assigned the judgments to one Gunther, who assigned them to one Elwood, and he to the plaintiff. The circumstances attending these assignments are sufficiently stated in the opinion.

The plaintiff in this action claimed all the damages and costs in the action, including the costs of the appeal to the Court of Appeals, and the court directed a verdict for the amount so claimed, which was rendered accordingly.

CHURCH, Ch. J. The first question is whether the sureties upon the undertaking, upon the appeal from the Special to the General Term of the Common Pleas, are liable for the costs of appeal from the General Term to the Court of Appeals. The undertaking, after reciting that the defendant intended to appeal to the General Term, was conditioned, among other things, that the appellant should pay "all costs and damages which may be awarded against him on said appeal." The judgment was affirmed at the General Term and an appeal taken to the Court of Appeals, upon which an undertaking was executed and perfected, by other persons, as sureties, according to sections 334 and 335 of the Code. The costs and damages in the Court of Appeals are not within the terms of the undertaking, nor was an appeal to the Court of Appeals necessary to procure an affirmance of the judgment in the General Term, and upon what principle the liability of sureties can be thus extended, and their contract enlarged, it is difficult to comprehend. The learned judge who delivered the opinion in the court below, was clearly right

in his opinion that the defendants were not liable for these costs as an original question, but he erred in supposing that the adjudications of this court, and other courts, had settled the question in favor of such liability. The principal case in this court relied upon, is Robinson v. Plimpton (25 N. Y. 484). In that case, upon the appeal to the General Term, the judgment was reversed by that court; but upon an appeal to the Court of Appeals, the judgment of the General Term was reversed, and that of the court below affirmed, and the sureties, upon the appeal to the General Term, were held not discharged by reason of the reversal in the first instance, but were held liable, and this was upon the express ground that the proceedings in the Court of Appeals were necessary, and had the effect to obliterate the erroneous judgment of the General Term, and to procure an affirmance in that court, and that, when the affirmance was procured, the contingency upon which the liability of the sureties depended had occurred, and that it was immaterial whether the first erroneous action of the General Term was corrected by that court, as it clearly had power to do, or by the mandate of a higher court. The reversal was expunged, and held for nothing. It was as though such action had not been taken. The General Term had power to do this itself. If it had, and upon a rehearing had affirmed the judgment, it would have been too clear for cavil that the contingency of liability, viz., an affirmance by the General Term, had occurred. That it was done by the command of a higher tribunal did not change its effect, and this court held, and we think properly, that substantially for the purpose of enforcing the undertaking, it was the same as though the General Term had decided right in the first instance. This decision has no bearing upon the question in the present case, and the observations of the learned judges who delivered opinions, when applied to the facts, have no relevancy to the facts of this case. Here the judgment was affirmed at General Term. The liability of the defendants was fixed. They had agreed to pay that judgment, and the costs upon that appeal. They did not agree to pay the costs upon an appeal by the defendant to any other court. When a further appeal was taken to the Court of Appeals, the statute required that a new undertaking should be given for the costs in that court, unless waived by the plaintiff. If given, that undertaking, in addition to the responsibility of the defendant, was his only

reliance for the costs in the Court of Appeals; if waived by him, the responsibility of the defendant was his only security.

Bennett v. Brown (20 N. Y. 99) was the case of a bond given upon issuing an attachment against non-resident debtors, conditioned to pay all damages and costs which they should sustain by reason of issuing the attachment if the plaintiff should fail to recover judgment thereon. A judgment was obtained before the justice, but it was reversed on certiorari to the Common Pleas. The court held the defendant liable for the judgment for costs in the Common Pleas. The terms of the bond did not restrict the liability to a failure to recover before the justice, but extended to a final recovery in the action, and when the justice's judgment was reversed, it was as though never rendered. The principle of the decision is analogous to that in 25 New York (*supra*). Gardner v. Barney (24 How. Pr. 467) was similar in facts to Robinson v. Plimpton (*supra*), and Smith v. Crouse (24 Barb. 433) was similar in principle. Tibbles v. O'Connor (28 Barb. 538), was upon an undertaking in behalf of the plaintiff in an action upon a claim and delivery of personal property conditioned, among other things, for the payment of such sum as might "for any cause" be recovered in the action. The court held that the costs recovered upon appeal to the General Term were covered by the terms of the undertaking, as they clearly were. Ball v. Gardner (21 Wend. 270) and Traver v. Nichols (7 Wend. 434) were like Bennett v. Brown (*supra*). Neither of these authorities touch the point involved here, and we have been referred to no authority holding that when the judgment was affirmed at the General Term, and the liability of the sureties upon the appeal to that court fixed, any further liability could be imposed upon them by appeals to other courts. Such a result would enlarge the contract and violate well known elementary principles; and the distinction between such a case, and the cases cited is manifest.

If this was the only point in the case a new trial would be unnecessary, as the amount of the costs in the Court of Appeals could be deducted, and the judgment affirmed for the balance, but various other questions are raised by the appellant the most important of which is that the sureties upon the appeal to the Court of Appeals were released by a former owner of the judgment, and that such release operated to discharge the defendants from liability upon the first undertaking. The judge at Circuit

directed a verdict, and if the fact of release was established, or if the evidence tended to establish it, and it constituted a defence, it was error to direct a verdict. The question involves the relative liability of the sureties upon the appeal to the General Term, and the sureties upon the appeal to the Court of Appeals, as between themselves. The original plaintiff in the judgments assigned them to Gunther, the latter to Elwood and he to the plaintiff. The evidence tends to show that Gunther acted for the benefit of Schuchman and Muller the sureties in the undertaking upon the appeal to the Court of Appeals, and that they furnished the money to pay the original plaintiff $400 and to pay Elwood, the attorney, $500. The first agreement between Gunther and Elwood confirms this view. By that agreement Elwood was to receive the $500 in full for the costs and counsel fee up to that time, and for conducting the case through the Court of Appeals. It was also agreed, that in case any money should be collected of the defendants or of the "prior sureties," Elwood was to have one-half up to $500, and one-third above that sum; and it was expressly agreed that no proceedings should be taken against Schuchman and Muller upon the undertaking on the appeal to the Court of Appeals. It is difficult to find a reason for such an agreement, except from the fact inferable from the other evidence that Gunther was acting in behalf of those sureties. The second agreement shows this more strongly. By this Gunther assigned the judgments to Elwood, and the latter expressly released Schuchman and Muller from all liability by reason of their undertaking, and Gunther covenanted, "on the part of" Schuchman and Muller, that they would make no claim against Elwood or the original plaintiff for the money paid to either of them; and this agreement was witnessed by Muller, thus evincing his assent and authority. From these agreements and the other evidence it is quite clear that Gunther acted as the friend and agent for the last sureties, and that their object was to relieve themselves from liability upon their undertaking. But whether this was so or not the effect of the transaction was to release them. Elwood could not, against his own covenant, have made any claim against them. The only title transferred to him was the judgment against the defendant therein and a claim against the "prior sureties," upon condition that the sureties to the Court of Appeals should be released. This plaintiff could acquire from

him nothing more. He stands in Elwood's place and is subject to any defence valid against Elwood, so that, in any view for the purposes of this action, the last sureties must be regarded as released and discharged, and the question is, what effect this had upon the liability of these defendants upon the undertaking to the General Term.

As before observed, when the judgment was affirmed at the General Term the liability of the defendants was fixed. The defendant, their principal, had a right of appeal to the Court of Appeals; but to do so it was, in the first place, indispensable to furnish sureties to an undertaking for $500 to secure the costs (unless waived by the plaintiff) and to stay proceedings, to an undertaking to pay the judgment if affirmed. Schuchman and Muller became such sureties and thereby prevented the collection of the judgment until the determination of the appeal which might be for several years. But for their intervention the judgments may have been collected of the defendant therein. They secured the delay by agreeing to pay the judgment. The present defendants may have been injured and justice would seem to demand, that between parties thus situated the primary liability should rest upon those who intervened to procure the delay. It is a general rule that sureties, upon payment, are entitled to be substituted to all the rights and remedies of the creditor as to any fund, lien or equity to which the latter may resort for payment, and in equity are entitled to the benefits of any judgment or instrument against the principal. (1 Comst. 595; 1 Story's Eq. Jur. §449, note 5, and cases cited.) This right of substitution does not depend upon contract but upon principles of equity arising out of the relation of principal and surety, and the obligation of the former to indemnify the latter against loss. (Id.) Upon the affirmance of the judgments at the General Term, these defendants had a right to pay the same as sureties, and to be substituted to the rights of the plaintiff in the judgments and to enforce the same against the defendant therein. In that case, upon appeal to the Court of Appeals, the undertaking would necessarily inure to the benefit of the defendants as equitable owners of the judgments, and upon affirmance in the Court of Appeals they could enforce it against the second sureties. The latter agreed, upon the contingency of affirmance, to stand in the place of their principal, the defendant in the judgments, and to pay the judgments. In effect

they became sureties to and not for these defendants, and, hence, would not have been entitled, upon payment, to substitution against them. (Armstrong's Appeal, 5 W. & S. 352.)

In Parsons v. Briddock (2 Vern. 608) the principal in a bond was sued and arrested, and gave bail. The sureties in the original bond having been sued and paid the judgment, it was decreed that the judgment against the bail be assigned to them to reimburse them what they had paid. This decision seems to have been questioned by the Lord Chancellor, in Hodgson v. Shaw (3 Myl. & K. 182), as being in conflict with Copis v. Middleton (1 T. & Russ. 224) upon the point of a right to the assignment of the judgment, a point which has been considerably controverted in England, but which in this country has been settled against the doctrine of Copis v. Middleton, and in favor of the right of sureties to the benefit of the instrument or specialty paid. (4 J. Ch. 129; 1 Story's Eq. Juris. §499 b, note 5 and cases cited.) But this difference does not affect the point involved here as to the superior obligation between the two sets of sureties to pay this debt. It only applies to the remedy and not the relative obligation.

In Pennsylvania, under a statute authorizing a stay of execution for a year upon giving security, it has been repeatedly held that the surety for the original debt, upon payment, is entitled to the remedy of the creditor against the surety upon the stay. (Burns v. Huntington Bk., 1 Penn. 395; Pott v. Nathans, 1 W. & S. 155; Schnitzel's Appeal, 49 Penn. St. 23.) The reasoning in these cases applies to this, that the later surety suffers no injustice in being obliged to do what he has agreed; and that his equities are subordinate to those of the original surety, because his interposition may have been the means of involving the first surety in ultimate liability to pay. McCormick's Admrs. v. Irwin (35 Penn. St. 111) was a case involving the equities between sureties, and the same principle was recognized and adopted. We think, upon principle and authority, that the later sureties are primarily liable as between them and the first sureties, and it follows that the release of such later sureties by the creditor discharged the defendants, because it deprived them of a remedy over to which they would otherwise have been entitled. The rule is comprehensively stated by Story: "That if a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by

the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged." (1 Story's Eq. Juris. § 325.) The question of the liability of the defendants to the owner of the judgments, after the appeal to the Court of Appeals, if the sureties upon such appeal had not been released, is not necessarily involved, and is not considered. We hold that, assuming such liability, the discharge of the surety upon such appeal discharged the defendants from liability upon the appeal to the General Term. The point was sufficiently raised at the trial.

The judgment must be reversed, and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

OPP v. WARD. 1890.

135 Ind. 241; 24 N. E. Rep. 974; 21 Am. St. Rep. 220.

Appeal from circuit court, Tippecanoe county, A. E. Paige, Judge.

Suit by William L. Ward against John Opp and Wilson & Hanna, in which he seeks to be subrogated to the rights of Wilson & Hanna under an appeal bond executed by James H. Telford as principal and John Opp as surety. Judgment was recovered by plaintiff, which the court limited in amount to $760.15. The defendant Opp appealed, assigning as error the insufficiency of the complaint, the incorrectness of the court's conclusions of law, and the overruling of a motion for new trial; it being objected to the complaint that it did not appear that plaintiff had discharged the whole debt for which the appeal-bond was security, it not stating what amount of costs, if any, Wilson & Hanna had received judgment for against Telford, nor averring that the costs were paid.

MITCHELL, J. The questions for decision arise upon the following facts: In 1876, Wilson & Hanna leased certain premises in the city of LaFayette to James H. Telford, who agreed to pay a stipulated sum as rent, and to surrender the premises at the end of one year. Ward became bound as guarantor for the faithful performance by the lessee of the covenants or agree-

ments contained in the lease. Telford went into possession, but refused to surrender at the end of the term; and the lessors recovered judgment against him for possession, and for $164.44 damages. Telford appealed to this court, Opp becoming surety on his appeal-bond, by means of which all proceedings to enforce the judgment were suspended, and the lessors were thereby kept out of possession from the 31st day of January, 1878, the date of the judgment, until the 20th day of May, 1881; the judgment having been affirmed on the 15th day of February, 1881, Telford v. Wilson, 71 Ind. 555. Thereupon, Wilson & Hanna brought suit, and recovered judgment against Ward on his contract of guaranty. The amount recovered was $676, besides costs; the amount specified being the rental value of the leased premises from the date of the judgment appealed from to the 16th day of July, 1880, at which date Telford died, having previously paid the judgment recovered against him for damages. The judgment against Ward was afterwards affirmed by this court on appeal. Ward v. Wilson, 100 Ind. 52. Ward subsequently paid the judgment recovered against him, which, with accumulated interest and costs, amounted when paid to $838.30; and thereupon he brought this suit against Opp on the appeal-bond. Wilson & Hanna were made parties defendant to answer. They disclaimed any interest in the appeal-bond except that they claimed judgment in their favor for a small amount of costs which remained unpaid in their suit against Telford. The finding of the court was in favor of the plaintiff below.

If the plaintiff was entitled to recover, it was because, after paying the judgment recovered by Wilson & Hanna against him for the costs that accrued pending the appeal taken by Telford, he became subrogated to their rights and remedies upon the appeal-bond. Subrogation is an equitable device, and rests upon the principles of justice and equity, which it is intended to accomplish. The doctrine is well established that one who occupies the attitude of a surety will be subrogated to all the rights, remedies, and securities which the creditor had, in case the former has been compelled to pay a debt which in equity and good conscience should have been paid by another. Payment by the surety is equivalent to a purchase from the creditor, and operates as an equitable assignment of the debt, and all its incidents, to the former. Thomas v. Stewart, 117 Ind. 50, 18 N. E. Rep. 505; Pence v. Armstrong, 95 Ind. 191; Arbogast v.

Hays, 98 Ind. 26; Acer v. Hotchkiss, 97 N. Y. 395. These principles are familiar, and of frequent application. The application of the doctrine of subrogation requires (1) that a person must have paid a debt due to a third person, for the payment of which another was in equity primarily liable; and (2) that, in paying the debt, the person paying acted under the compulsion of saving himself from loss, and not as a mere volunteer. Insurance Co. v. Middleport, 124 U. S. 534, 8 Sup. Ct. Rep. 625; Hoover v. Epler, 52 Pa. St. 522; Southall v. Farish, 7 S. E. Rep. 534; Sheld. Subr. §240.

It is insisted, however, that, in the case of successive sureties, who become bound by separate obligations for the payment of the same debt, the equity of the last surety is superior to that of the first, and that, as the liability of the plaintiff below as guarantor was prior in point of time to that of the appellant as surety on the appeal-bond, both being bound for the same debt, the equity of the lätter was at least equal, if not superior, to that of the former. This view is not maintainable in a case like the one under consideration. It is quite true the plaintiff below became liable as guarantor for the payment of all rent, as well as for all damages growing out of the unlawful detention of the property by the tenant. But it is also true that his liability, which theretofore was uncertain and contingent, became certain and fixed, when the landlord recovered judgment for the possession of the leased premises, and for damages for their unlawful detention. The guarantor had the right to pay the amount of the judgment recovered against his principal, and thus put an end to his liability at once. By the voluntary intervention of the appellant in becoming surety on the appeal-bond, all further proceedings on the judgment by which the landlord was awarded the right of immediate possession were stayed, and the hands of the guarantor were effectually tied until the appeal was disposed of. It is settled that the sureties on appeal-bond given by a judgment defendant on appeal from a judgment for the possession of real estate are liable not only for the money judgment, but also for the rental value of the real estate pending the appeal, to an amount not exceeding the penalty of the bond. Opp v. Ten Eyck, 99 Ind. 345; Hays v. Wilstach, 101 Ind. 100; Graeter v. De Wolf, 112 Ind. 1, 13 N. E. Rep. 111; Stults v. Zahn, 117 Ind. 297, 20 N. E. Rep. 154. Upon the determination of the appeal the landlord had his

election to sue on the appeal-bond, and recover the rental value of the premises unlawfully detained, or to proceed against the guarantor on the lease. He adopted the latter alternative. If he had sued on the appeal-bond, and recovered judgment against the surety, it is quite certain that the latter would have had no standing in a court of equity to recover from the guarantor. This is so because he occupied the position of a volunteer; and, as is pertinently said in Acer v. Hotchkiss, *supra*: "One who is only a volunteer can not invoke the aid of subrogation, for such a person can establish no equity." Gans v. Thieme, 93 N. Y. 232. Having intervened as a volunteer, and by his interposition stayed proceedings on the judgment for possession to the prejudice of the guarantor, whose liability had become fixed and at an end so far as respects future rents, it must be considered in equity that he did so upon the condition that he would take the place of the guarantor from that time forward. Barnes v. Mott, 64 N. Y. 397; Hinckley v. Kreitz, 58 N. Y. 583; Schnitzel's Appeal, 49 Pa. St. 23. The interposition of the second surety having been the means of involving the first in the liability which he was ultimately compelled to pay, the equity of the first is complete; and he is entitled, on the principles of subrogation, to stand as though the creditor had assigned the appeal bond to him. Brandenburg v. Flynn, 12 B. Mon. 397; Bohannon v. Combs, Id. 563; Brandt, Sur. §227; Sheld. Subr. §131. One who intervenes without the solicitation of a surety, and by his interference ties the hands of the latter so as to prolong or add to his liability, and prevent the effectual enforcement of the judgment or process against the principal, as it might have been but for his intervention, cannot be heard to say that he occupies a position which should commend him to the favor of a court of equity. The conclusion above stated is in no wise in conflict with that reached in Kane v. State, 78 Ind. 103. In that case the principal had given bond, with sureties, to the state, conditioned, among other things, that he would pay all fines and costs which might be assessed against him for any violation of the statute regulating the sale of intoxicating liquors. Fines were afterwards assessed against him which, with costs, amounted to a considerable sum. These were afterwards paid by one who became replevin bail for the stay of execution, and it was correctly held that the bail became subrogated to the rights of the state, and entitled to maintain

a suit against the surety on the bond. In that case, however, the liability of the sureties on the bond was in no way enlarged or prolonged, nor was the situation of the sureties in any way changed, by the intervention of the replevin bail. Possibly, if it had been shown that the principal had property out of which the fine and costs could have been made in case execution had issued when the fines were assessed, and that he had since disposed of the property to the prejudice of the sureties on the bond, a different conclusion might have been reached. Where the first surety suffers loss, or where his liability is increased or prolonged so as to render him liable to suffer loss by the intervention of the second, the latter assumes all the risk arising from his voluntary interposition. In such a case there is no injustice in requiring the second surety to perform his undertaking according to its terms, since by his intervention he has been the means of involving the first surety in a liability which otherwise he might have escaped. The conclusion above is not in conflict with that reached in Holmes v. Day, 108 Mass. 563.

It is undoubtedly true, as the appellant contends, that a surety will not be subrogated to the equities or securities of the creditor until the claim of the latter for the payment of which he has taken security has been fully satisfied. Vert v. Voss, 74 Ind. 565; Sheld. Subr. §127. The reason is that the law will not permit the right of action to enforce the security to be divided between the creditor and the surety, nor allow the debtor to be subjected to the inconvenience of two actions instead of one. In the present case the creditors were made parties to the suit. They disclaimed any interest in the bond, except as to some costs, and the finding of the court fails to show that they are entitled to recover anything on the bond. All those who had any interest in the bond were before the court, and it was not so material whether they were plaintiffs or defendants, so that the judgment settled the rights of all the parties before the court. Morningstar v. Cunningham, 110 Ind. 328, 11 N. E. Rep. 593; Insurance Co. v. Gilman, 112 Ind. 7, 13 N. E. Rep. 118.

Upon the facts as found it appears, therefore, that the creditor's claim has been lawfully satisfied, and the surety cannot be again vexed by another suit on the appeal-bond. There was no necessity that a demand should have been made before instituting the suit. It does not appear that the amount of the

recovery was too large. There was no error. The judgment is affirmed, with costs.

CHAPTER X.
SUBROGATION AND CONTRIBUTION.

a. The surety who is compelled to pay the debt of the principal is by law ipso facto subrogated to the rights of the creditor and may sue the principal debtor.

BULLARD v. BROWN. 1902.
74 Vt. 120, 52 Atl. Rep. 422.

Appeal in chancery. Heard on master's report and orator's exceptions thereto, at the June Term, 1901, Tyler, Chancellor, presiding. Exceptions overruled and bill dismissed. The orator appealed.

Stafford, J. The defendant, Chester Brown, finding himself at the age of eighty-one years, alone in the world and in need of some one to keep his house and take care of him, told the defendant Betsey, a maiden lady of sixty-two years, that if she would be his wife he would give her everything he had, including his home place worth about $1,200; that there was a mortgage on it for $225, and that that was all he owed. All of which was strictly true, except that he owed the orator, a lawyer, for services in a chancery suit then on the docket, some $38, and that the orator was surety for costs in his behalf in the same case. So she took him at his word, and they were married. Some months later the orator sent him his bill; and in a few days Chester deeded the place to Betsey, and turned over to her every dollar of his personal property, just as he had promised. Then when the orator, meeting him, asked him for his pay, he told him he didn't know as he owed him anything; that he had got his property in such shape that nothing could be collected of him, and he shouldn't pay. So the orator sued him before a justice of the peace, demanding fifty dollars. When the suit was begun the case in chancery was still pending, but when the trial day came that case had been disposed of, and the orator had found himself liable to pay costs for his client of the amount of $20.20. Chester defaulted at the justice hearing, through

failing to find the right door in the hall-way, and the orator got leave to raise the *ad damnum* to $65, and then took judgment for his bill for services, with interest, and for the $20.20 which he was liable to pay as costs, but which he had not paid, and has not yet, although he has always stood ready to do so when required, making his judgment in all $60.01, besides costs. When he brought suit he had the place in question attached as Chester's property. He has now taken out execution and levied upon it, and brings this bill, under V. S. 1848, to have the conveyance to Betsey declared void and the property held to satisfy his claim, on the ground that that conveyance was in fraud of his rights.

The orator objected to all parol testimony tending to show an ante-nuptial agreement as ruled out by the statute of frauds, and the facts were found solely upon such oral testimony. His position here is that, the promise Chester made to Betsey before marriage being one that she could not have enforced by reason of the statute, his conveyance to her after marriage, made in pursuance of that promise, was a purely voluntary conveyance (Lloyd v. Fulton, 1 Otto 479, 23 L. Ed. 363; Chancellor Kent's opinion in Reade v. Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520; Carter v. Smith, 82 Ala. 334, 60 Am. R. 738, 740; Deihon v. Wood, 148 Mass. 132, 1 L. R. A. 158, and note; and numerous cases stated in Am. Digest, Century Ed. Vol. 23, columns 1839-1845), and being a voluntary conveyance, was not good as against the orator, no property being left and no provision made to pay him (Corey v. Morrill, 71 Vt. 51, 42 Atl. 976), although if the conveyance had been made to her before marriage it might have stood, inasmuch as she acted in good faith. Pierce v. Harrington, 58 Vt. 649, 7 Atl. 462. But we will not decide this point, for if we should go with the orator as far as he asks upon that line, we should not be at the end of the case. We must still meet the question, whether the orator is entitled to enforce his judgment as it is made up.

He objected to all evidence tending to impeach his judgment, and filed exceptions to the report on the ground of such admission; but in this court he has made no objection of that sort, and we treat the case, as he has in his brief, upon the facts found by the master. It comes to this: that, even if he had a right to raise his *ad damnum* in the circumstances, he had no right to take judgment for the costs in the chancery suit, which he

had never paid; and a court of equity will not aid him in enforcing such a judgment.

Neither can this court correct that judgment at his request in this proceeding. If that could be done at all, this bill is not brought for such a purpose, but to perfect a lien under the existing judgment, and it is too late for him thus to retrace his steps.

Decree affirmed and cause remanded.

BRENTAL v. HELMS. 1791.

1 Root (Conn.) 291; 1 Am. Dec. 44.

Action on the case, declaring: That the plaintiff, at the special instance and request of the defendants, and for their proper debt and duty, on the fifteenth of April, 17—, became bound with them to the treasurer of the state in the present sum of one hundred and one pounds, five shillings, conditioned to pay fifty pounds, ten shillings and six pence, by—day of—, being the duties of forty-five hogsheads of rum; that the defendants, in consideration thereof, assumed and promised to indemnify and save harmless the plaintiff from all damages and cost he should suffer and pay on that account; that the plaintiff has been compelled to pay said debt, and been put to much cost, to his damage of eighty pounds.

Plea in bar: That the plaintiff hath never paid one farthing of said debt, nor been put to any cost on that account; nor hath he been sued until the day of the date of the plaintiff's writ, when a summons was served upon him. The plaintiff demurred to the defendant's plea.

The question was: Whether the plaintiff, being liable to be sued, and to be compelled to pay the debt, is a good cause of action upon this promise of indemnity; by the plaintiff it was contended that it was. By the defendant it was contended that neither a liability to be sued, nor being actually sued, is a good cause of action, upon a promise generally to save harmless and indemnify.

By COURT. That the defendant's plea is sufficient. Where a man is bound for the debt of another, at his special instance and

request, the law implies an obligation or promise to indemnify him. 3 Wilson 262. But is it to indemnify him against a mere liability to suffer damage, or to indemnify him against the damage which he shall actually suffer? It is undoubtedly the latter. One would suppose that any doubt or difficulty which has existed in resolving this question would be obviated by ascertaining, with precision, the facts in the cases, which are as follows, viz.: The plaintiff becomes bound with the defendants for their debt, and at their request; the defendants, in consideration thereof, promise to indemnify and save him harmless, on account of his thus becoming bound.

Now, what is meant by indemnifying and saving harmless? The terms are synonymous, and mean the same thing; they certainly mean that the defendants will indemnify and save the plaintiff from any and every loss and damage he may eventually suffer by reason of his becoming bound for them. This is done either by paying the debt, and thereby discharging the surety, or in case that is omitted, and the surety is obliged to pay the debt, by refunding to him the money and interest, and the expense and just damages for his risk and trouble; in either of these ways the surety is indemnified and the defendant's promise performed.

Two things are necessary to be united in order to furnish a good cause of action in any case, viz.: A violation of a right, which, in law language, is an injury, and a damage. Injury without damage, and damage without injury, are neither of them alone a ground of action; and it very often happens in society that men are exposed to suffer loss and damage, yet no action can be maintained until a damage is actually sustained. A man sells a piece of land, and covenants to warrant and defend it against all claims and demands whatever; suits may be brought against his grantee for the land, yet the warrantor is not liable on his covenant unless his grantee is evicted; and in that case, the covenant extends only to defend the title against an eviction, or to render damages to his grantee for the loss of the land, his expense, and trouble in defending it. The latter is equally a performing of his covenant as the former; for the covenant is, that the grantee shall hold the land, but, if he cannot, that the grantor shall make it good to him—that is, will pay him all his just damages and costs.

If an action will lie in favor of a surety against his principal

because he is exposed to pay the debt of his principal, it must be either to recover the sum he is liable for, or to compensate him for the liability; if for the former, he then will recover a sum of money from the principal, that he has never paid, and only, as the case may be, for the principal to recover it back again, for the creditor may never call upon the surety for it. If it be the latter, viz., for his liability only, and not for the debt, it will be difficult to find a rule of damages. Besides, if an action is maintainable on this ground, the surety may repeat his actions for this, from day to day, so long as he continues liable, as in case of a nuisance; and even after the principal has paid and discharged the debt, if the surety had at any time been liable, an action would be maintainable. The cases cited from the books, respecting sheriffs, and respecting bankrupts, were they to be considered as authorities here, prove nothing for the plaintiff; for the escape of a prisoner in jail, on an execution, is a tort, committed upon the jailer, and he thereby becomes debtor to the creditor; he may immediately pursue and retake the body, or have an action for the money.

In the case of bankruptcy, if a surety might have an action on the ground of his being liable only, it would be for damages only, which is not provable under the commission. But Lord Mansfield, in the case of Taylor v. Mills and Magnall, Cowper 525, where the plaintiff has become liable before the bankruptcy, lays it down as a settled principle that the plaintiff, till damnified, which he could not be until he had been called upon and had paid, could not bring an action; he did not pay the debt till after the commission issued, consequently his whole damage and cause of action arose after the bankruptcy. Where the engagement to indemnify is special, to pay the debt when it becomes due, and to indemnify, etc., the case would be otherwise.

5. *All securities given by the principal to the surety to indemnify the latter inure to the benefit of the creditor by subrogation.*

VAIL v. FOSTER ET AL. 1850.

4 N. Y. 312.

Bronson, Ch. J. The case is shortly this. The plaintiffs sold land to Morgan, who, instead of giving his bond and mortgage to the plaintiffs to secure the purchase money, got Flagler to give his note to the plaintiffs for the amount, payable in one year; and Morgan gave a bond and mortgage to Flagler for his indemnity, for the same amount, and payable at the same time with the note. Before the credit expired Flagler became insolvent and the plaintiffs seek relief, either on the ground of an equitable lien on the land for the purchase money, or by reaching the mortgage to Flagler, and having it foreclosed for the payment of the debt.

By taking the security of a third person for the purchase money the plaintiffs have lost their equitable lien on the land, and can not have relief in that form, as has been very clearly shown by the vice-chancellor in his opinion. And I agree in most that he has said upon the whole case. But there is one point on which I think the supreme court was right in reversing the vice-chancellor's decree, and directing a foreclosure of the mortgage for the benefit of the plaintiffs.

It is a settled rule in equity, that the creditor shall have the benefit of any counter bonds or collateral securities which the principal debtor has given to the surety, or person standing in the situation of a surety, for his indemnity. Such securities are regarded as trusts for the better security of the debt, and chancery will compel the execution of the trusts for the benefit of the creditor. Maure v. Harrison, 1 Eq. Cas. Ab. 93, K. 5; Curtis v. Tyler, 9 Paige 432; Wright v. Morley, 11 Ves. 22; Bank of Auburn v. Throop, 18 Johns. 505; 4 Kent 307, 6th ed.; 1 Story's Eq. §§ 502, 638. This principle covers the case, and the plaintiffs are entitled to the mortgage which Morgan, the principal debtor, gave to Flagler, the surety, for his indemnity.

But it is said that Morgan is not a debtor to the plaintiffs, and consequently that the relation of principal and surety does not exist between him and Flagler. It is true that Morgan did

not unite with Flagler in making the note, nor did he come under any other express obligation to the plaintiffs. But he was originally a debtor to the plaintiffs for the price of the land; and although the plaintiffs afterwards took the note of Flagler in lieu of the bond and mortgage of Morgan, they took it as a security only for the purchase money, without agreeing to receive it in satisfaction of the debt. Taking the note of a third person for an existing debt is not payment, unless the creditor agrees to receive it in payment; and I find no such agreement in this case. Morgan is still liable to the plaintiffs for the purchase money, and must of course by regarded, as the principal debtor; for it is entirely clear, upon the pleadings and proofs, that Flagler gave the note at the request, and as the surety of Morgan, without having any personal interest in the matter. We have then the ordinary case of creditor, principal and surety, to which the rule in question has been applied; and the mortgage which the principal debtor has given to the surety must be considered as a trust for the better security of the debt, which a court of equity will enforce for the benefit of the creditor.

Foster & Co., under their creditor's bill, took the effects of Flagler subject to this equity; and there is no bona fide purchaser in the case.

I am of the opinion that the decree of the supreme court is right, and should be affirmed.

Decree affirmed.

FARMERS' & TRADERS' NAT. BANK v. SNODGRASS. 1896.

29 Oregon 395; 45 Pac. Rep. 758.

Appeal from circuit court, Union county; Morton D. Clifford, Judge.

Action by the Farmers' & Traders' National Bank of La Grande and others against William J. Snodgrass and others. Judgment for defendants, and plaintiffs appeal. Modified.

BEAN, C. J. The material facts in this case may be thus summarized. On July 6, 1891, W. J. Snodgrass executed to William and Fred Proebstel a mortgage upon certain real estate, to indemnify them against liability on certain of his then outstanding notes, upon which they were sureties, and also as an in-

demnity against liability on such notes as they might thereafter execute as his sureties. Among the notes outstanding at the time the mortgage was given was one for $5,000, to the First National Bank of Portland, on which the appellant Palmer was a surety jointly with the Proebstels, and which he was compelled to and did pay on February 12, 1894. On January 3, 1893, and while the mortgage was still in force, the Proebstels and the respondent John Predmore executed, as sureties for Snodgrass, a note to the Security & Trust Company of Portland for $7,300, of which Predmore was compelled to and did pay the sum of $3,250 on April 12, 1894, the remainder of the notes being paid by the other parties. The mortgagees subsequently assigned the mortgage to the payees of the remaining notes on which they were sureties, who brought this suit to foreclose the same, making Palmer and Predmore parties thereto. A decree was entered foreclosing the mortgage, and directing that the proceeds of the sale of the mortgaged property be applied—First, to the payment of the costs and expenses of the suit; second, to the payment of the amount found due the plaintiffs; and, third, to the amount found due Palmer and Predmore, pro rata. From this decree, Palmer appeals, claiming that he is entitled to priority over Predmore, and in this contention we think he is right. The rule seems well settled that where one of several sureties after all had signed, and before the debt has been paid, obtains from the principal a mortgage or other security for his indemnity, it will inure to the benefit of his co-surety. Brandt, Sur. § 268; Sheld. Subr. §143; Steele v. Mealing, 24 Ala. 285; Brown v. Ray, 18 N. H. 102. Under this rule, the Proebstel mortgage inured to the benefit of Palmer; and, this being so, it necessarily follows that his equities are prior in time and superior in right to those of Predmore, who became a co-surety of the Proebstels, for Snodgrass, long after the mortgage was executed. As to Palmer, the mortgage took effect from its execution and delivery, but not as to Predmore until the note upon which he was a co-surety was made,—some 18 months thereafter. Van Winkle v. Johnson, 11 Or. 469, 5 Pac. 922. And hence the latter's rights thereunder are subject to those of Palmer. The decree will therefore be modified accordingly.

c. Equity will apportion the burden of suretyship equally among the solvent co-sureties.

LANSDALE v. COX. 1828.

7 T. B. Mon. (Ky.) 401.

Opinion of the court by Chief Justice BIBB.

Richard Lansdale and James Cox were the sureties of Shanks, in an injunction bond to Summers, who sued Cox, the surviving obligor, and had judgment for $730.24, besides costs, which was paid by Cox's surety in a replevin bond, and afterward paid by Cox to his surety. These proceedings were in the Nelson circuit court.

Cox thereafter, upon motion against the heirs of Shanks (402) the principal, (stating that there was no executor or administrator of Shanks,) had judgment, and execution, upon which the sheriff made a small part of the judgment, (about $35.19,) and returned that he could find no estate whereof to satisfy the residue.

Cox then sued his motion against the heirs and administrators, jointly, of his co-security, Lansdale, for contribution, and recovered judgment; to which the defendants prosecute this writ of error.

The whole doctrine of contribution between securities originated with courts of equity. There is no express contract for contribution; the bonds, obligations, bills, or notes, created liabilities from the obligors to the obligees. The contribution between co-sureties results from the maxim, that equality is equity. Proceeding on this, a surety is entitled to every remedy which the creditor has against the principal debtor; to stand in the place of the creditor; to enforce every security, and all means of payment; to have those securities transferred to him, though there was no stipulation for that. This right of a surety stands upon a principle of natural justice. The creditor may resort to principal, to either of the securities, for the whole, or to each for his proportion, and he has that right, if he, from partiality to one surety, or for other cause, will not enforce it, the court of equity gives the same right to the other surety, and enables him to enforce it. Natural justice says that one surety having become so with other sureties, shall not have the whole debt

thrown upon him by the choice of the creditor, in not resorting to remedies in his power, without having contribution from those who entered into the obligation equally with him. The obligation of co-sureties, to contribute to each other, is not founded in contract between them, but stood upon a principle of equity, until that principle of equity had been so universally acknowledged, that courts of law, in modern times, have assumed jurisdiction. This jurisdiction of the courts of common law is based upon the idea, that the equitable principle had been so long and so generally acknowledged, and enforced, that persons, in placing themselves under circumstances to which it applies, may be supposed to act under the dominion of contract, implied from the universality of that principle. For a great length of time, equity exercised its jurisdiction exclusively and undividedly; the jurisdiction assumed by the courts of law is, comparatively of very modern date; and is attended with great difficulty where there are many sureties; though simple and easy enough where there are but two sureties, one of whom brings him action against the other upon the implied assumpsit for a moiety.

The action at law, then, by one surety against his co-surety, arises out of an implied undertaking, not by force of express contract, and consequently the heirs can not have been expressly bound by the ancestor. So that the action at law, by one surety against the representatives of a deceased co-surety, must, by the principles of the common law, be against the executor or administrator. To reach the heirs in a suit at law, the remedy given by our statute in such cases, must be jointly against the executors or administrators and heirs, not against the heirs alone. The remedy in equity by substitution of the co-surety in place of the creditor, and so allowing the one surety his redress against his co-surety or co-sureties for contribution, still remains; the remedy at law, by a regular action jointly against the heirs and executors or administrators, by force and operation of the statute of 1792, may be pursued.

Reversed, with directions to lower court to dismiss motion.

GROSS v. DAVIS. 1889.

87 Tenn. 226; 11 S. W. Rep. 92; 10 Am. St. Rep. 635; ~~*11 L. R. A. 635.*~~

Appeal from chancery court, Franklin county; E. D. Hancock, Chancellor.

CALDWELL, J. This is a bill for contribution among sureties. In April, 1860, John G. Enochs was qualified as clerk of the county court of Franklin county, with Gross, Henderson, Colyar, Slatter, and others as sureties on his official bond. After the close of the war, several suits were instituted against him and his sureties. One of those suits finally resulted in a decree in this court against the defendants for about $800, besides costs. The others were successfully defended. Gross paid the greater part of the decree mentioned, including $130 court costs. The other part of that decree was paid by Davis, as personal representative of Slatter, who had died. Enochs, the principal, and all the sureties, except those above named, were insolvent when the present proceedings were commenced, and for that reason were not made parties. In his answer Davis set up the fact of the payment made by him on the decree, and insisted that the estate of his intestate was thereby discharged from further liability. Henderson claimed, in his answer, that he had paid for himself and co-sureties more than $1,000 in fees to lawyers, for defending the several suits brought against them and Enochs. Colyar made no defense, and decree *pro confesso* was taken against him. The chancellor adjudged that Gross was entitled to recover from Davis, Henderson, and Colyar each one-fourth of the sum he had paid, with interest; making the recovery against each of the three $210.06. He then adjudged that Davis was entitled to a credit on the recovery against him by the amount of one-fourth of the sum which Davis had paid, with interest. That credit being $48.04, the net balance of the recovery against Davis was $162.02. Nothing was allowed Henderson on account of attorney's fees claimed to have been paid by him. Both Davis and Henderson have appealed.

The decree is erroneous. It proceeds upon the idea that every surety who has paid a part of the joint liability may recover from each of his co-sureties his proportional part of the sum so paid. As applied to a case where the whole liability has been

discharged by one of several sureties, the rule adopted by the chancellor is correct; but it is not applicable when more than one of the sureties have made payments on the joint indebtedness. In the latter case, all payments must be added together, and the aggregate divided equally among the sureties. To illustrate: If the $840.24 paid by Gross had discharged the whole liability, and none of the other sureties had paid anything, he would be entitled to a decree against each of the other three solvent sureties for one-fourth of that amount, namely, $210.06. But as the chancellor adjudged that Gross paid $840.24, and Davis $192.16, and that the other sureties had paid nothing, he should, in that case, have added those two sums together, and divided the aggregate of $1,032.40 into four equal parts, of $258.10 each, and allowed contribution accordingly. The decree thus indicated, upon the data used by the chancellor, would have given Davis credit for the full amount paid by him, and settled the equities of all the sureties, instead of allowing him credit for only $48.04, and leaving him with a claim for the same amount against both Henderson and Colyar, as does the decree actually rendered. It is well settled that one surety may have contribution from his co-sureties only when, and to the extent that, he may have paid more than his ratable proportion of their joint liability. Brandt Sur. § 251. The very foundation of the doctrine is the fact that one has paid more and another less than his share. Hence Davis could not maintain a suit for contribution at all, under the facts of this case. He could not recover from Henderson and Colyar the one-fourth of the amount he has paid, yet the decree leaves him with his claim therefor against each of them.

The decree of the chancellor is erroneous, not only in the result reached upon the assumption that only Gross and Davis had made payments on the joint liabilities, but it is also erroneous in that assumption itself; for it is distinctly proven that Henderson paid $1,087.60, for which all the sureties were legally bound to contribute. This sum includes principal and interest up to the time he gave his deposition, which, though in fact a little earlier, we treat as of the date of the decree below. This particular date for the addition of interest is adopted for convenience, because the sums already stated, as having been paid by Gross and Davis, respectively, include interest up to the same date. Then we find the facts to be that

Gross paid $840.24, Davis $192.16, and Henderson $1,087.60; making a total of $2,120, one-fourth of which is $530. The $530 represent the share of each of the four solvent sureties. This being a suit in equity, the rate of contribution is determined according to the number of sureties on the bond, as in an action at law. Riley v. Rhea, 5 Lea 116. Brandt Sur. § 252. In chancery, the insolvent principal and insolvent sureties are not even necessary parties. Id. § 256. Henderson has paid more than his share, hence no recovery can be had against him, and, notwithstanding his excessive payment, he can have no recovery in his favor, in this proceeding, for the excess, because he set up his payment as a matter of defense only, and did not seek any affirmative relief against any one. Gross, however, having filed his bill for that purpose, is entitled to contribution from Davis, who has paid less than his share, and from Colyar, who has paid nothing. The amount paid by Gross in excess of his share is $310.24. That, with interest from date of decree below, he is entitled to recover from Davis and Colyar, one-half from each. We say one-half from each, because the bill treats these two defendants as equally liable to the complainant, and seeks the same decree against each of them. Such expression in pleading, on the part of the complainant, will be regarded, when there is no contravening equity. The fact that Davis has already paid something, and that Colyar has paid nothing, affords no reason why Gross should not have an equal recovery against each of them, for one-half the excess paid by Gross and the full sum paid by Davis together do not aggregate as much as $530, the share of one surety in the whole liability discharged.

It has been argued in behalf of Gross that the doctrine of contribution does not extend to attorney's fees, and for that reason the payment of $1,087.60 by Henderson was properly disregarded by the chancellor. In this view we cannot concur. Suits were commenced against Enochs and his sureties. The services of counsel were needed by the sureties, who made a common defense. Counsel were employed in the name of all the sureties, and rendered services for their mutual benefit. Gross knew this. He accepted the services, took an interest in the progress of the litigation, and distinctly agreed with his co-sureties, from time to time, that he would pay his share of the fees. These were the fees paid by Henderson. The employment of counsel was not only prudent, but it was necessary, and

probably resulted in saving the sureties large sums of money. A surety who pays fees under such circumstances is entitled to contribution, the same as another surety who pays a judgment or decree recovered against them. By the authorities it is sufficient that the fees were incurred in making a prudent defense. Fletcher v. Jackson, 23 Vt. 581; Brandt Sur. § 247; 4 Amer. & Eng. Ency. of Law 3, note 1. As against Gross, it is insisted that the chancellor erred in allowing him contribution for the $130 of court costs which he paid. The decree in this respect was right. It has been well said, by the supreme court of Maine: "The costs cannot be distinguished from the debt. Every equitable principle which entitles the plaintiff to contribution for the one applies equally to the other." Davis v. Emerson, 17 Me. 64; Brandt Sur. § 247. Contribution was decreed as to traveling expenses in Preston v. Campbell, 3 Hayw. (Tenn.) 20. Let the decree below be reversed, and decree be entered here in accordance with this opinion. One-fourth of all costs will be paid by each of the four parties.

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d. Securities received as indemnity by one surety inure to the benefit of all co-sureties bound by the same contract.

HOOVER v. MOWRER.

84 Iowa 43; 50 N. W. Rep. 62; 35 Am. St. Rep. 293.

Appeal from district court, Buchanan county; C. P. Cough, Judge.

The action was brought at law on a promissory note, but transferred to equity. A cross-bill was filed by defendants Hoover & Hoover against defendants Craig & Adams, which was dismissed. A judgment on the note was rendered against all the defendants. An appeal was taken by Hoover & Hoover from the order dismissing the cross-bill. No appeal was taken from the judgment on the note.

Beck, C. J. 1. The note upon which the suit was originally brought was executed by J. J. Mowrer and his wife, Sarah Mowrer, to R. W. Adams, E. O. Craig, C. Hoover, Sr., and James Hoover, and by them indorsed to plaintiff. The purpose

of the note was to raise money for the makers upon the credit of the payees and indorsers, they becoming security for the makers. The note was the renewal of prior notes made by the parties, and a continuance in fact of the prior transaction. The Hoovers filed a cross-bill alleging that since the commencement of the action they had paid the note to the holder; that the Mowrers are insolvent; and that, for the purpose of protecting all the sureties, they executed to Craig & Adams a mortgage upon certain town lots and a stock of general merchandise owned by them, and they took possession of the goods, and converted them to their own use. Upon this cross-bill the Hoovers pray that Craig & Adams be required to account for the value of the goods, and that the mortgage inure to the benefit of all the sureties, and that to that end, and for the purpose of protecting all, proper judgment be entered in their favor for one-half the value of the goods. Craig & Adams deny that they are co-sureties of the Hoovers, and are liable to share with them the proceeds of the mortgaged property, and apply any part thereof to discharge their liability on the note.

2. We are first required to determine whether Craig & Adams may appropriate the proceeds of the mortgaged property to their exclusive benefit, or whether the mortgage should be regarded as security for all of the indorsers of the note. Counsel for the appellees state quite correctly, we think, the rule of law, "that securities obtained by one surety inure to the benefit of all." But he limits the application of the rule to cases where the securities have been obtained after all the sureties have become liable, and without any agreement to that effect before they become liable. We think these conditions alone do not limit the rule, and that its application extends to all cases where a surety attempts, by fraud or unfair dealings, to obtain advantage over his co-surety. The authorities cited by counsel we think do not support his position. The rule exists for the protection of the sureties, and not for the good of the creditors or the principal debtor. By the contract of sureties, they became severally bound for the debt of the principal. But it is plain that each should contribute equally in case they are called upon to pay the debt. One cannot in any way escape the burden while his co-surety is not relieved. When they enter into the contract, they do so subject to that equitable rule, which becomes, as it were, a contract between them. Each surety is

authorized to rely upon this rule to protect himself from imposition and fraud which his co-surety and principal might practice upon him. The principal, by indemnifying one of the sureties, would relieve him of the burden of the suretyship which the other still carried. This would be unfair and inequitable. In case it is done with the knowledge and consent of the other surety, it would thereby be relieved of objection, for the surety could not complain of that to which he assents. And when sureties do not become bound at the same time or by the same contract, as when additional or further security is demanded, and another surety becomes bound in response to such demand, the sureties can doubtless stipulate for indemnity; for by so doing they do not prejudice the prior or subsequent surety, whose burden is not affected by the indemnity, and who, as he did not become bound by the same contract with the other surety, cannot claim equality with him. In our opinion, when several sureties become bound by the same instrument, one cannot arrange with his principal for indemnity for himself without the knowledge and assent of the others. In the case before us, the sureties became bound by the same instrument, and no assent was given by the Hoovers that Craig & Adams should obtain indemnity by the mortgage. Neither did the Hoovers have knowledge as to the indemnity obtained by Craig & Adams. In our opinion, the proceeds of the security acquired by them must be held for the benefit of all the sureties. The district court erred in dismissing the cross-bill.

3. It appears from the evidence that Craig & Adams realized $1,126.42 out of the goods. They paid for rent, clerk hire, and other expenses, which are not disputed by counsel on either side, $158.75. They also paid $50 attorney's fees in defending against a garnishment proceeding to charge them for the mortgaged property. As these fees were expended in protecting the property which created the fund now in question, they ought to be paid out of that fund. A mortgage on the goods to Cook, amounting to $286.85, was paid by Craig & Adams. It was executed by J. J. Mowrer, and not by his wife, to whom the goods had been transferred, and who executed the mortgage to Craig & Adams. Counsel for the Hoovers insist that the mortgage did not bind the property, and therefore should not have been paid. But, as J. J. Mowrer was in possession of the goods and conducting the store as his own, it is hardly probable

that his wife could successfully set up a claim against the mortgage to Cook. It is not shown that at the time there was any lien against the property superior to the mortgage to Cook. We think Craig & Adams should have credit for the amount paid upon the mortgage, $286.85. This, added to the other expenditures approved, gives $460.60, the sum to be allowed them. They claim that they should be allowed $202 on account of a note on which Adams was surety, which he paid, and $75 owed directly by Mowrer to Adams. The mortgage taken by Craig & Adams operated for the benefit of all the sureties. They ought not to be permitted to lessen the funds realized from the mortgage by appropriating it to their individual claims. They stand as trustees for all the sureties, and are required to use that trust fund for the benefit of the sureties alone. The goods realized $1,126.42; expenses and Cook mortgage, $465.85; leaving $660.57 to be paid for benefit of sureties. One-half of this sum the Hoovers are entitled to recover, for which a decree and judgment will be entered in this court. The Hoovers recovered judgment against Craig & Adams in this action for $847.96. No complaint is made thereof, and no appeal is taken therefrom; it is not for consideration in this case. The decree dismissing the cross-bill is reversed.

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e. After an obligation has been fully discharged by the sureties paying equal amounts the doctrine of contribution no longer applies and one may receive security for himself alone.

CRAMER v. REDMAN. 1902.

10 Wyoming 328, 68 Pac. Rep. 1003.

Error to the District Court, Johnson county; Hon. Joseph L. Stotts, Judge.

Potter, Chief Justice. The parties to this suit, upon the failure of the principal debtor to pay a promissory note which they had signed as co-sureties, paid the amount thereof in equal proportions, each of them paying the sum of $1,071.50. The note had been given January 15, 1889, and was paid by said sureties September 14, 1889. In 1899, probably in September of that

year, the plaintiff in error received $2,210.91 from the net proceeds of a certain contract which the principal debtor, in 1898, had assigned to him. The sum so received is claimed by plaintiff in error to be the amount, including interest then due to him, from the principal debtor on account of the money advanced by him toward the payment of the note aforesaid. This suit was instituted by defendant in error for an accounting and to recover one-half of the sum so received by the plaintiff in error. It is alleged in the petition that the principal debtor was and is insolvent, and that upon the payment of the note the parties—plaintiff and defendant—agreed orally, in consideration of the payment of an equal amount by each, and of their mutual promises, and in consideration of the exercise of care, vigilance and energy of each to collect the amounts paid for their joint benefit, and the giving to each of an interest in the debt owing him by the principal debtor, that the debt should be held by said parties as one owing to them jointly, and that they would exercise their best care and endeavor to collect the same for their joint benefit, and would divide and share equally the sums collected by each, until the said debt should be discharged with interest. The plaintiff in error, defendant below, by his answer, admitted that the parties had been co-sureties and as such had each paid an equal proportion of the amount due on the note, but alleged that thereupon they became several and not joint creditors of the principal maker, and denied the making of the agreement set out in the petition. He further alleged that the contract out of which he had collected the money in controversy had been assigned to him to secure the amount paid by him upon the note with interest.

The case was tried to the court without a jury, and the plaintiff, defendant in error here, was awarded judgment for $1,105.45 and costs. Motion for a new trial filed by the defendant was overruled, and the case comes to this court on error.

The right of the plaintiff below to recover must depend upon the agreement, if any, made between the defendant and himself at the time they paid the note. He may not rely upon the ordinary equities applicable between co-sureties, for the reason that, upon the payment of the note by the sureties in equal proportions, the equities no longer existed. It is true that, as a general rule, any securities in the hands of a surety, as well as any indemnity received by him, will inure to the benefit of

all the sureties. (1 Story's Eq. Juris. § 499; Harris on Subrogation, §§ 186, 200, 207, 379.) The ground of relief in such cases does not stand upon contract express or implied, but arises from principles of equity independent of contract. Where, however, the debt is paid by several sureties in equal proportions, the equities between them as co-sureties cease, and each becomes an independent creditor of the principal for the amount he may have paid; so that if one of them subsequently receives indemnity from the principal for his own debt, the others are not entitled to participate therein, such indemnity not proceeding from securities held by the surety or creditor previous to payment of the debt. (Harris on Subrogation, § 379; Urbahn v. Martin (Tex. Civ. App.), 46 S. W. 291; Hall v. Cushman, 16 N. H. 462; Harrison v. Phillips, 46 Mo. 520.)

But there can be no doubt that the sureties, upon so paying the debt, may contract between themselves for an equal division of whatever may afterward be collected by either one upon the debt from the principal, each agreeing that any amount collected by him shall be collected for the joint benefit of all, and that the others shall be entitled to share equally therein until the obligation of the principal debtor to them shall be satisfied. (Smith v. Hicks, 5 Wend. 48.) And in such case the mutual promises constitute a good and sufficient consideration. (Philpot v. Gruninger, 14 Wall. 577; Morrow v. Jones, 41 Neb. 867; Taylor v. Smith, 116 N. C. 531; Phillips v. Preston, 5 How. (U. S.) 278; Briggs v. Tillotson, 8 Johns. 304; Clark on Contracts 165; 1 Parsons on Contracts (5th Ed.) 448.) In the case of Smith v. Hicks, *supra*, it was held that where two persons agree equally to bear and pay the losses and damages which may be sustained in consequence of one of them becoming special bail for a third person, and after they have equally contributed to the payment of the debt, one of them is refunded the amount paid by him, he is answerable to the other for a moiety of the money received by him.

f. A co-surety having paid the whole debt will be given judgment against the insolvent estate of his co-surety for full amount paid and may receive dividends till he is repaid one-half of amount paid by him.

PACE v. PACE. 1898.

95 Va. 792; 30 S. E. Rep. 361; 44 L. R. A. 459.

Appeal from corporation court of Danville.

Action by James B. Pace against the administrator of John R. Pace's estate to determine his claims as co-surety on a note paid by him. From a judgment granting plaintiff leave to prove for half of his claim, plaintiff appeals. Reversed.

Harrison, J. The facts of this case, in brief, are that on April 7, 1893, one T. J. Talbott (under the name of Pace, Talbott & Co.), John R. Pace, and James B. Pace made a note for $16,000, payable to William F. Cheek or order, 120 days after date. T. J. Talbott was the principal in the note, and John R. Pace and James B. Pace co-sureties. T. J. Talbott died in the fall of 1894, entirely insolvent. Prior to his death, to wit, on October 9, 1893, John R. Pace died, leaving an estate not sufficient to pay more than 50 cents on the dollar of his debts. In May, 1894, this suit was brought to administer John R. Pace's estate, and a decree of reference was entered in July, 1894. On the 19th of September, 1895, being pressed by the executors of the creditor, William F. Cheek, James B. Pace took up the note in question by paying $16,551.57, the entire amount, principal and unpaid interest, to that time. Thereupon James B. Pace tendered proof of these facts to the commissioner in this suit, and claimed to rank in the distribution of John R. Pace's estate for the whole of the debt so paid by him, until he had received one-half of the amount paid by him; but the commissioner reported that he could only rank for one-half the debt, and an exception made by James B. Pace on that score was overruled by the court below, to which ruling this appeal was taken.

The contention of the appellee is that J. B. Pace could not rank against the estate of his co-surety for the whole debt when the co-surety only owed him one-half of the debt; in other

words, that appellant had no right to prove for the one-half of the debt which he himself was primarily bound to pay.

The question presented is an important one in the administration of insolvent estates, and there is some conflict of opinion in respect thereto. We are, however, satisfied that the view taken by the learned counsel for the appellant is sustained by the best reason and the weight of authority.

In Enders v. Brune, 4 Rand. (Va.) 447, Judge CARR, in discussing the doctrine of substitution, says: "It has nothing of form, nothing of technicality, about it; and he who, in administering it, would stick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object."

The doctrine is well settled that the surety has the right of substitution against the estate of his principal, where payment of a preferred debt has been made by such surety after the death of the principal; and the rule of substitution for the purpose of enforcing contribution among co-sureties is not different. One surety who pays the common debt is entitled to be subrogated to all the rights and remedies of the creditor, as against his co-sureties, in precisely the same manner as against the principal debtor. Robertson v. Trigg, 32 Grat. 76; Dering v. Earl of Winchelsea, 1 White & T. Lead. Cas. Eq. (3d Am. Ed.) p. 131, and notes.

In Ex parte Stokes, De Gex 618, Stokes, the creditor, held a bond executed by a principal and three sureties. Two of the sureties, Clark and Phillips, became bankrupts, and Stokes, the creditor, proved against their estates. Thereafter the principal debtor compounded with his creditors; and the other surety, Thomas Charles Ord, executed an assignment for the benefit of his. Stokes, the creditor, by dividends, received from the principal debtor, from the estate of Clark, one of the sureties, and from Thomas Charles Ord, realized his whole debt, to the payment whereof the remaining surety, Phillips, contributed nothing. The creditor realized from the estate of Thomas Charles Ord 10s. in the pound, whereas the just proportion payable by each surety was only 4s. 10d. in the pound. Thereupon the assignees of Thomas Charles Ord petitioned for leave to stand in the place of the creditor for his entire debt as against the estate of Phillips, which had paid nothing, so as to realize

from that estate its just proportion, viz., 4s. 10d. in the pound. The petition was allowed, Sir J. L. Knight BRUCE saying:

"The question then substantially is whether, as between the estates of the two sureties, when (one of them having become bankrupt) the creditor has proved the debt under the fiat, and has afterwards been paid in full, partly by the principal debtor, and partly by the surety, not a bankrupt, the latter has the right to use the proof for the purpose of obtaining from the bankrupt's estate that amount of contribution to which the bankrupt is, or but for the bankruptcy would have been, liable, so far as the proof can furnish means for that end; and I think that he has.

"Where several persons are liable, each *in solido*, to a debt, the creditor may enforce payment in a manner which, as between the debtors themselves, is unjust. This must sometimes happen; but in such cases is it not the function and the duty of a court of justice, at least of a court of equity, to place them in the same situation, between themselves, as if the creditor had enforced his rights against them in a manner conformable to their rights against each other, so far as it can be done? Generally speaking, the law of this country, as I apprehend, answers that question in the affirmative.

"Now in the present case, had Mr. Stokes regulated his proceeding in such a manner, a portion of what he has received from Mr. Thomas Charles Ord's estate would have been taken by Mr. Stokes from Mr. Phillip's estate, if available for the purpose. The mere circumstance that it has not until the present time become practically available for the purpose is, I conceive, nothing.

"This has not been done; but justice requires, I apprehend, that the nearest possible approach to that state of things shall take place, which must, I suppose, be effected by allowing the claim intended to be made by the present petition. Mr. Clark's estate, unless I mistake, has paid 5s. in the pound, but not more; while I collect that Mr. Thomas Charles Ord's estate has paid 10s. in the pound, and Mr. Phillips' estate as yet nothing . . . . . .

"I repeat that it was originally equitable between these sureties or their estates that the benefit of the proof or some portion of it should go in diminution of Mr. T. Charles Ord's burden; that, in my view, it was not competent to Mr. Stokes, by any

election upon his part, to deprive Mr. Thomas Charles Ord's estate of that right; that it could not, I think, be defeated by delays and difficulties occurring in the liquidation or collection of Mr. Phillips' assets; and that the right appears to me substantially to have continued and now to exist."

In the case of Morgan v. Hill (1894), 3 Ch. 400, a debt was owing by a principal debtor and five sureties. Nothing could be realized from the principal debtor, or from one of the sureties, and only a very insignificant sum from another of the sureties. So, three of the sureties were left to bear the liability. One of these three made an assignment, which, after the payment of specified prior claims, provided for the payment of his remaining debts ratably. The creditor presented his claim for payment to the trustees in the assignment, but, before the trustees paid anything thereon, the debt was paid by the other two sureties, who subsequently also took from the creditor an assignment of his debt and securities. These two sureties then claimed the right to receive a dividend from the assigned estate of their co-surety on the whole amount of the debt paid by them, until they had received one-third thereof, that being the just proportion payable by each surety; and this claim was allowed by KEKEWICH, J., and on appeal his order was affirmed.

KEKEWICK, J., who decided the case in the lower court, said: "Two out of three sureties paid the whole debt, and, having so done, they are entitled to stand in the shoes of the creditor whose whole debt they have paid. That would seem to be according to natural justice; but, whether it be so or not, at all events it is strictly in accordance with the provisions of the mercantile law amendment act of 1856 (19 & 20 Vict. c. 97).

"A surety in such case is to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name, of the creditor in any action to obtain indemnification."

The reference of the learned judge to the mercantile law amendment act, as justifying his conclusion, if not justified by its conformity to "natural justice," is a circumstance that does not detract from the weight of this case as an authority in this state, because that act was passed to do away with the doctrine laid down in Copis v. Middleton, which was disapproved by this court in Powell's Ex'rs v. White, 11 Leigh, 309, in a learned

opinion by Judge Tucker, and the act referred to simply declared the law in England to be what it had theretofore been under our decisions.

In Hess's Estate, 69 Pa. St. 272, the precise question involved here was presented, and the supreme court of Pennsylvania held that the surety paying the debt, after the death of his co-surety, was entitled to prove against his estate for the entire amount of the debt. The court says:

"The debts paid by Christian Lintner, and transferred to him, stand exactly in the same position to the assets of the decedent, Henry Hess, as if presented by the creditors themselves; their status being fixed by his death, and nothing having occurred to change or reduce the amount. So far as they existed as debts payable out of the estate, no part of them is paid or extinguished, for the effect of subrogation is to consider them in full life, and enjoying all the rights of the original creditors."

"We regard the administrators of the decedent as trustees, and the creditors as *cestuis que trustent*, owners of their share of the assets, and which, applying the principle in Miller's Appeal, 35 Pa. St. 481, and Patten's Appeal, 45 Pa. St. 151, passed to the co-surety, who stepped into their shoes when he paid the amount due on such claims."

In the case of Miller's Appeal, 35 Pa. St. 481, an insolvent debtor had executed a general assignment for the benefit of all his creditors. Subsequently, the assignor became entitled to a legacy which was attached by one of the creditors; and from that attachment he realized a portion of his debt. It was held that such creditor was, notwithstanding, entitled to a dividend of the assigned estate on the whole amount of his claim as it stood at the time the assignment was made.

In this case, Judge Strong (afterwards of the supreme court of the United States) said: "By the deed of assignment the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors; and each creditor owned such a proportionate part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but, whatever it was, he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made. . . . It amounts to very little to argue that Miller's recovery of the

legacy operated with precisely the same effect as if voluntary payment had been made by the assignor after the assignment; that is, that it extinguished the debt to the amount recovered. No doubt, it did. But it is not as creditor that he is entitled to the distributive share of the trust fund. His rights are those of an owner, by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the question of his ownership. The reduction of that debt, therefore, after creation of the trust, and after his ownership had become fixed, it would seem, must be immaterial."

There are many cases holding that where a creditor of an insolvent person, who is dead, or has made an assignment for the general benefit of creditors, holds collateral security for his debt, and, after the death or the assignment of his debtor, realizes on the collaterals, he may, notwithstanding, prove against the decedent's estate or the assigned estate for the full amount of his debt as it stood at the time of the death or assignment. The grounds upon which these cases proceed are ably set forth in the opinion of Judge TAFT in Bank v. Armstrong, 59 Fed. 380, 8 C. C. A. 163, in which he reviews all the authorities.

The only case involving the question here presented, cited by appellee, is that of Institution v. Hathaway, 134 Mass. 69. In this case the holder of a note, by an arrangement with a solvent surety thereon, proved the note against the insolvent estate of another surety, and then assigned the note with his claim against the estate to the solvent surety, who paid the holder in full. The court held that this amounted to a payment of the note, ordered the proof to be expunged, and only allowed the surety to prove one-half of the claim. In this conclusion we cannot concur. There are three authorities cited in its support, which are not in our judgment, entitled to the weight given them. The one chiefly relied on is Maxwell v. Heron, a Scotch case, which, if applicable, has been overruled in England, and the law there settled, as we have seen, to the contrary.

It further appears that the decisions of the Massachusetts court upon analogous questions have not been in accord with the views of this and other courts upon like questions.

An important, if not vital, objection to the Massachusetts view of this question, is that the rights of the surety, instead of being fixed and certain, are made to depend upon accident or upon

the caprice of the creditor. It encourages a policy of obstruction in the administration of estate; for, if those interested in the insolvent estate can delay its settlement until the creditor demands his debt from the solvent surety, they reap the advantage by having a smaller debt to share with them in its distribution. On the other hand, temptation is held out for a corresponding effort on the part of the solvent surety to avoid paying, until the creditor has received such dividends as the insolvent estate will pay, because the amount for which he is liable is thereby reduced. It gives opportunity to the creditor, by collusion or otherwise, to further the interest of one surety at the expense of the just and equal rights of the co-surety.

Results like these, which depend, not upon the rights of the parties fixed by law, but upon the superior skill of one over the other in maneuvering for position, or upon the will and caprice of the creditor, or upon mere accident, cannot be founded upon sound principles.

In Watts v. Kinney, 3 Leigh, 272, Judge TUCKER, speaking for this court, says: The surety, in paying the debt, "is governed by the law of this court. Even on entering into his engagement as surety he looks to its well-established principles. He knows, if he pays the debt to the obligee, he will stand in the obligee's shoes. He knows he will be subrogated to all the rights of the obligee, as they subsist at the time he makes his payment. He knows that a court of equity looks not to form, but to substance; that it looks to the debt which is to be paid, not to the hand which may happen to hold it; that the fund charged with its payment shall be so applied, whosoever may be the person entitled; and that it considers a debt as never discharged until it is discharged by payment to the proper person, and by the proper person. He knows that that court, which permits no act of a trustee to prejudice the *cestui que* trust, will not permit one who stands in the relation of the creditor or obligee to the surety to bar him of those rights which the principles of equity have secured to him. He is conscious that his rights do not depend upon the caprice of the creditor, or the whim of an executor, or the sense of right of other creditors, but rest upon the immutable principles of justice and equity; and, in making his payment, he does it in the confidence that he will be entitled to be indemnified to the full amount to which his creditor could have charged the assets of the principal."

These considerations bring us, in the case at bar, to the conclusion that John R. Pace's estate and James B. Pace were each bond *in solido* to their common creditor William F. Cheek for the entire amount of the debt in question; that, at the death of John R. Pace, the rights of his creditors became fixed, the assets of the state passing, as a trust fund, into the hands of his representatives charged with the payment of his debts; that, subject to costs of administration and preferred debts, William F. Cheek then became entitled to an interest in said estate, not then ascertained, but capable of being made certain, bearing such proportion to the entire assets as his debt bore to the entire indebtedness; that when James B. Pace, the surety, paid his debt, he became at once subrogated to all the rights, remedies, and means of payment, in respect thereto, that were possessed by the creditor, and had the right to prove, as the creditor could have done, the entire debt against the estate of his co-surety John R. Pace, and to receive dividends upon the basis of the entire debt until reimbursed that half of the common burden belonging to the co-surety. This conclusion works no injustice to the other creditors of John R. Pace. Their rights, which became fixed at the death of the debtor, remain unimpaired. They had no interest in that proportion of the assets belonging to William F. Cheek. That interest was as distinct and separate from theirs as if it had been already segregated and set apart for the benefit of William F. Cheek. They could not add to or take from it while it was the property of Cheek; nor can they do so now that it stands, in equity, as indemnity for the surety who has paid it.

For these reasons, the decree appealed from must be reversed, and the cause remanded, to be proceeded with in accordance with the views expressed in this opinion.

Cardwell, J., absent. Buchanan, J., absent, interested in case involving same question.

CHAPTER XI.

GUARANTY OF PAYMENT OR COLLECTION.

a. A guarantor of payment is immediately and absolutely liable to the creditor.

ROBERTS v. HAWKINS. 1888.

70 Mich. 566; 38 N. W. 575.

Error to Superior Court of Grand Rapids. Assumpsit.

LONG, J. January 12, 1884, one Lyman D. Follett made his promissory note as follows:

"$1,000.

Grand Rapids, Mich., January 12, 1884.

One year after date, I promise to pay to the order of Helen M. Roberts one thousand dollars, with interest at eight per cent. per annum. Value received. LYMAN D. FOLLETT."

And defendant signed an indorsement on the back thereof, as follows:

"For value received, I hereby guarantee the payment of the within. Value received. L. E. HAWKINS."

On the delivery of this note to plaintiff, she paid Follett $1,000. January 8, 1885, seven days before this note became due, Follett paid one year's interest; and neither at that time, nor at the maturity of the note, was the same presented to Follett or defendant for payment. No notice of non-payment was given defendant then or at any time prior to June 8, 1887. January 25, 1886, Follett paid the interest for the next year, and January 17, 1887, for the year following. About June 8, 1887, the note being then two years and five months overdue, it was first presented to defendant, and payment demanded and refused. August 13 this suit was brought.

On the trial, plaintiff, having proved the note and guaranty, and its non-payment, rested. Defendant then sought to make his defense as pleaded, and offer to show:

1. That he was an accommodation guarantor, without consideration or security.

2. That, at or about the maturity of the note, he inquired of the maker of the note if it was paid, and was told it was.

3. That neither at the maturity of the note, nor at any subsequent time, prior to June 8, 1887, was any notice of the non-payment of this note given to defendant, nor any demand made on him for the payment thereof.

4. That at the maturity of this note, and for some considerable time thereafter—at least a year—Follett, the maker of the note, was solvent, and had property out of which defendant could have procured him to pay the note or obtained security.

5. That when defendant, on June 8, 1887, learned of the non-payment of this note, the maker was insolvent, out of the jurisdiction, and that he could then obtain no security or payment.

The court directed a general verdict for plaintiff on all the counts of the declaration. Judgment being entered on the verdict in favor of plaintiff for the amount of the note and interest, defendant brings the case into this court by writ of error.

The declaration contains three counts. The first alleges the guaranty, demand of the maker at maturity, non-payment and notice of said demand and non-payment to defendant at maturity.

The second alleges the guaranty, the refusal by maker to pay at maturity, and notice to defendant, at maturity, of maker's refusal.

The third is the common counts in assumpsit, with copy of note annexed, and an alleged indorsement on back of L. E. Hawkins, without any guaranty over it.

The plea is the general issue, with notice of the defense of release by plaintiff's failure to give notice of non-payment to defendant, and the consequent damage and loss to him thereby.

It is claimed that the court erred in receiving the note and guaranty in evidence under the third count in plaintiff's declaration, for the reason that the note and guaranty offered were not the note and guaranty set forth in that count; that the contract set out in plaintiff's third count was that defendant had indorsed his name in black on the back of the note, not payable to his order; and that this would make him a maker of the note, and liable as such, while the note offered had a guaranty of payment indorsed thereon. Defendant claimed that this was a variance, and that the court should have excluded the guar-

anty under this third count, and confined the verdict to a recovery under the first two counts.

As we view the case, however, this objection has no force. The plaintiff being entitled to recover under the first and second counts of the declaration, the defendant was not prejudiced in the course taken by the court in not withdrawing all consideration of the case under the third count. The declaration was sufficient in the first two counts to allow a recovery thereunder.

The chief error complained of is the exclusion of the entire defense, and the direction of a verdict for plaintiff. On the trial the plaintiff proved by a witness the application for the loan, the loaning of the money, the giving of the note and guaranty, and, after reading the note and guaranty in evidence, rested. The defendant was then called and sworn as a witness in his own behalf, and was asked by his counsel:

"Q. When that note became due, in January, 1885—January 15—was any notice given you of the fact that it remained unpaid?"

To this question counsel for plaintiff objected, that the same was irrelevant and immaterial; that the defendant was not an indorser nor guarantor of collection, but of payment of the note.

Counsel for the defendant then offered to show by the witness that he had no notice of the non-payment of the note prior to June 8, 1887; that he was an accommodation guarantor without security; that, at or near the maturity of the note, he inquired of the maker, and was informed that it was paid; that, at that time, the maker of the note was solvent, and for some considerable time thereafter—probably a year—and that the defendant could, if he had any knowledge of its non-payment, have secured himself, or procured the maker to pay it; that, when the defendant learned of the non-payment, of the note, the maker was insolvent, and out of the State, and no security could have been obtained by the defendant; the counsel then saying—

"That this, of course, is the line of defense marked out by the notice in the pleadings. It is all covered by my brother's argument; and, if we have no right to show that defense, then, of course, there remains nothing but for the court to direct a verdict for the amount of the note, and interest."

The court sustained the objection, and directed a verdict for plaintiff.

In considering the case, the defendant's offer to prove this state of facts must be taken as true. Clay, etc., Ins. Co. v. Manufacturing Co., 31 Mich. 356. Under this offer by the defendant, the issue is made: Is a person not being a party to a promissory note, who at its date and before delivery, and for the purpose of having a loan made upon the strength of his guaranty, guarantees the payment of such note, liable thereon in case the note is not paid at maturity, without notice of non-payment having been given to him by the holder at the maturity of the note, or within a reasonable time thereafter; or in case notice is not given, and no proceedings taken to collect the note from the maker, and the maker of the note, at the maturity thereof, was solvent, and subsequently, and before suit is brought on the guaranty, becomes insolvent, can such guarantor, when such action is brought against him, set up such insolvency as a defense? The defense being based on plaintiff's laches in not giving notice to the defendant of the non-payment of this note at maturity, and the consequent damage to defendant thereby, the correctness of the court's ruling depends on whether or not there rested on the plaintiff the duty to give such notice under any circumstances.

The defendant claims that his liability existed only on the happening of a contingency and the performance of a condition; that whether or not that contingency happened, or condition was performed, was matter peculiarly within the knowledge of the plaintiff, and not within his own; and that if plaintiff intended to assert the performance of the condition, or the happening of the contingency, whereby alone defendant was to become liable, it was her duty to do so within a reasonable time, and, in any event, before the maker of the note became insolvent and a fugitive; that her neglect to do so, and the damage to him thereby, has released him from the obligation of his conditional contract.

The position, however, of a guarantor of payment, as between him and the maker of the note, is that of a surety. It is a common-law contract, and not a contract known to the law-merchant. It is an absolute promise to pay if the maker does not pay, and the right of action accrues against the guarantor at the moment the maker fails to pay. The guarantor would not be discharged by any neglect or even refusal on the part of the holder of the note to prosecute the principal, even if the

maker was solvent at the maturity of the note, and subsequently became insolvent; and the fact that no notice of non-payment was given the guarantor at the maturity of the note, or at any time before bringing suit, would not affect the rights of the holder of the note against the guarantor. The guarantor's remedy was to have paid the note, and taken it up, and himself proceeded against the maker.

A guaranty is held to be a contract by which one person is bound to another for the due fulfillment of a promise or engagement of a third party. 2 Pars. Cont. 3.

The contract or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person who is himself primarily responsible for the payment of such debt or the performance of the act or duty. 3 Add. Cont. Sec. 1111; 3 Kent Com. 121; Wright v. Simpson, 6 Ves. 734.

In the case of Pain v. Packard, 13 Johns. 174 (decided in 1816), it was held that if the surety call upon the creditor to collect the debt of the principal, and he disregard that request, and thereby the surety is injured, as by the subsequent insolvency of the principal, the surety was thereby discharged. A directly contrary decision was given by Chancellor Kent, upon argument and full consideration, the following year. King v. Baldwin, 2 Johns. Ch. 554. Two years later the last decision was reversed by the court of errors by casting vote of the presiding officer, a layman, and against the opinon of the majority of the judges. King v. Baldwin, 17 Johns. 384.

In the case of Brown v. Curtiss, 2 N. Y. 226 (decided in 1849), the action was brought against the guarantor of a promissory note. On the trial it was admitted that there had been no demand of the maker, nor any notice of non-payment, and the note was dated April 2, 1838, and payable six months after the date. The suit was brought against the guarantor in September, 1845. The defendant offered to prove that, from the time the note fell due until the latter part of 1843, the maker was able to pay the note; that he then failed, and was insolvent at the time of the commencement of the suit, and still remained so. This evidence was objected to, and excluded, and verdict directed for plaintiff. The court (at p. 227) says:

"The undertaking of the defendant was not conditional, like

that of an indorser; nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the non-payment, nor that he should sue the maker, or use any diligence to get the money from him. . . . Proof that when the note became due, and for several years afterwards, the maker was abundantly able to pay, and that he had since become insolvent, would be no answer to this action. The defendant was under an absolute agreement to see that the maker paid the note at maturity. . . .

"If the defendant wished to have him sued, he should have taken up the note, and brought the suit himself. The plaintiff was under no obligation to institute legal proceedings."

The weight of authority, both in this country and in England, sustains this doctrine, and we think with much good reason. Bellows v. Lowell, 5 Pick. 310; Davis v. Higgins, 3 N. H. 231; Page v. Webster, 15 Me. 249; Dennis v. Rider, 2 McLean, 451.

In Train v. Jones, 11 Vt. 446, it is said:

"An absolute guaranty that the debt of a third person shall be paid, or that he shall pay it, imposes the same obligation upon the guarantor. In either case, it is an absolute guaranty of the sum stipulated, and the creditor is not bound to use diligence, or to give reasonable notice of non-payment." Noyes v. Nichols, 28 Vt. 174.

In Bloom v. Warder, 13 Neb. 478 (14 N. W. Rep. 396), which was an action against the guarantors of payment of a promissory note, the court says:

"This is an absolute contract, for a lawful consideration, that the money expressed in the note shall be paid at maturity thereof at all events, and depends in no degree upon a demand of payment of the maker of the note, or any diligence on the part of the holder."

Mere passiveness on the part of the holder will not release the guarantor, even if the maker of the note was solvent at its maturity, and thereafter became insolvent. Breed v. Hillhouse, 7 Conn. 528; Bank v. Hopson, 53 Conn. 454 (5 Atl. Rep. 601); Foster v. Tolleson, 13 Rich. Law, 33; Machine Co. v. Jones, 61 Mo. 409; Barker v. Scudder, 56 Id. 276; Norton v. Eastman, 4

Greenl. 521; Brown v. Curtiss, 2 N. Y. 225; Allen v. Rightmere, 20 Johns. 365; Bank v. Sinclair, 60 N. H. 100; Gage v. Bank, 79 Ill. 62; Hungerford v. O'Brien, 37 Minn. 306 (34 N. W. Rep. 161).

It follows that, this being an absolute undertaking on the part of the defendant as guarantor to pay the amount of this note at maturity in the event of the default of payment by the principal, the guarantor could not demand any diligence on the part of the holder of the note to collect the same from the principal. It was his duty to perform his contract—that is, to pay the note upon default of the principal; and it is no answer for him to say that the principal was solvent at the maturity of the note, and that the same could then have been collected of him by the holder, and that he has since become insolvent. If he wished to protect himself against loss, he should have kept his engagement with the holder of the note, paid it upon default of the principal, taken up the note, and himself prosecuted the party for whose faithful performance of the contract he became liable.

The court properly directed the verdict for the plaintiff; and the judgment of the court below must be affirmed, with costs.

The other Justices concurred.

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b. A guarantor of collection is liable only when the creditor cannot with due diligence collect of the principal debtor.

McMURRAY v. NOYES. 1878.

72 N. Y. 523, 28 Am. Rep. 180.

RAPPALLO, J. The guaranty on which this action is brought is contained in an assignment of a bond and mortgage, and is in the following form:

"I hereby covenant . . . that in case of foreclosure and sale of the mortgaged premises described in said mortgage, if the proceeds of such sale shall be insufficient to satisfy the same, with the cost of foreclosure, I will pay the amount of such deficiency to the said party of the second part, or its assigns on demand."

On the part of the appellants, it is contended that this guaranty is subject to the rules applicable to guaranties of collection, and thus laches in foreclosing the mortgage, after default, is a defense. The respondents insist that it is a guaranty of payment, and that they were under no obligation to use diligence in endeavoring to collect the mortgage debt by foreclosure.

The fundamental distinction between a guaranty of payment and one of collection is, that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while in the second case the undertaking is that if the demand cannot be collected by legal proceedings the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by those means are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor.

These rules are well settled and are not controverted, and the only question is to which class of guaranties the one now before us belongs.

It is apparent upon the face of the instrument that the undertaking of the defendant was not an unconditional one that the mortgagor should pay, or that the guarantor would pay on default of the mortgagor, but only that the guarantor would pay, in case of a deficiency arising on a foreclosure and sale. The foreclosure and sale were consequently conditions precedent, and the general principle is, that wherever a condition precedent is to be performed for the purpose of establishing the liability of a surety or guarantor, such condition must be performed in good faith and with due diligence. It is upon this principle that, in case of a guaranty of collection, diligence is required of the creditor.

I am unable to see why this principle is not applicable to the guaranty now in controversy. The respondents claim that it is an undertaking to pay any deficiency which may arise, and is, therefore, a guaranty of payment of the mortgage debt to that extent, and to be governed by the same rules as if it had been

a guaranty of payment of the whole mortgage. But the fallacy of this reasoning is that it is not an unconditional guaranty that the mortgagor will pay the mortgage debt, or any part of it, but only that after the remedy against the land has been exhausted, and the deficiency ascertained by foreclosure and sale, the guarantor will pay such deficiency. The only difference between this and an ordinary guaranty of collection is, that in the latter case the undertaking is that after it has been ascertained by all such legal proceedings as the case admits of, that the demand cannot be collected, the guarantor will pay; while in the present case the only proceedings which the creditor is bound to adopt are a foreclosure of the mortgage and sale of the mortgaged lands. To that extent the condition precedent exists alike in both cases, and the duty of exercising due diligence attaches, there being nothing in the instrument qualifying or dispensing with it.

The case of Goldsmith v. Brown (35 Barb. 484) is relied upon by the respondents as sustaining their position. In that case the covenant was, as construed by the court, to pay the deficiency upon the mortgage debt whenever the remedy against the lands mortgaged should have been exhausted and the deficiency ascertained. The decision in that case can only be sustained by construing the covenant as waiving diligence in foreclosing and binding the covenanter to pay the deficiency without regard to the time of the foreclosure. Nothing in the covenant now under examination has any relation to the time of the foreclosure, or can be construed as waiving diligence required by the general rules of law in performing the condition.

The delay in foreclosing in the present case was fourteen months after the mortgage debt became due. During upward of ten months of this time the property was a sufficient security, but afterward the buildings thereon were destroyed by fire, and the value was reduced below the amount of the mortgage debt. It cannot be questioned that this delay was sufficient to constitute laches. In Craig v. Parkis, 40 N. Y. 181, a delay of six months in foreclosing a bond and mortgage was held to be laches which discharged a guaranty of its collection.

The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur.

Judgment reversed.

CLARK v. KELLOGG. 1893.

96 Mich. 171; 55 N. W. Rep. 676.

MONTGOMERY, J. The plaintiffs sued the defendant, counting upon a breach of an agreement given on the occasion, and in consideration, of the purchase by the plaintiffs from the defendant of a stock of goods and a quantity of notes and accounts. That portion of the agreement material to be considered in determining the questions involved read as follows:

"The said party of the first part . . . does covenant and agree . . . that the annexed invoice is a true statement of the amount and value of stock, merchandise, and property, and also guarantee, represent, and warrant that there is in said stock goods to the value of $14,709.68; also that the amount of $29,702.54 net shall be realized, without charging for the personal services of the parties of the second part, nor other charges of second parties, except incurred in suits, by the parties of the second part, upon the accounts and notes herein conveyed. The parties of the second part shall use due diligence in their collection."

The declaration counted upon this agreement, and set out no subsequent modification or waiver of its terms. On the trial the plaintiffs sought to recover by showing that they had dealt with the accounts as men of ordinary business judgment would, and also sought to show that the defendant had, as to a large portion of the accounts, directed the plaintiffs as to what he would require as evidence of due diligence, and that the plaintiffs had complied with the demands of the defendant in this regard.

1. The circuit judge construed the original contract as amounting to a guaranty of collection, and held that no showing of diligence was sufficient which did not include proof that the accounts had each been put in judgment, and execution had been taken out, and returned unsatisfied. This ruling was unquestionably right, if the proper construction was placed on the contract. Bosman v. Akeley, 39 Mich. 710; Schermerhorn v. Conner, 41 Id. 374.

It is contended, however, that the contract in question should not be construed as a guaranty of collection of each individual account, requiring resort to legal process in the collection of each, but amounted to a warranty and representation that there

should be realized $29,702.54 from the total of the accounts; and that the fact that the amount guaranteed to be realized was much less than the face of the accounts negatives the idea that resort should be had to suit upon each account. The infirmity of this construction is that it ignores the subsequent language, "The parties of the second part shall use due diligence in their collection," or accords to this language a meaning at variance with the settled significance of the terms employed. What constitutes due diligence is settled by the cases of Bosman v. Akeley and Schermerhorn v. Conner, *supra.*

In the case of Ralph v. Eldredge, 58 Hun. 203, a similar question was presented. Plaintiff and defendant were co-partners. Defendant conveyed his interest to the plaintiff in the notes, accounts and demands owing to the firm. The defendant at the same time executed to the plaintiff a bond with the condition that defendant should pay to the plaintiff one-half of the amount of the notes, accounts, and claims of the late firm assigned by defendant to plaintiff that should prove to be uncollectible, if any such there should be. The court say:

"It seems to be settled in this state that a guaranty of collection is an undertaking to pay the sum of money guaranteed, provided the principal debtor is prosecuted to judgment and execution with due diligence, and the same cannot be collected of him. . . . The plaintiff urges that the bond does not guarantee the collection of these claims, but is only a contract to pay plaintiff one-half of the amount of those which should turn out bad. But the bond uses the word 'collectible,' and the question must be, what is the legal meaning of that word? That word has a definite meaning as decided in the cases above cited; and that meaning should be here enforced."

The legal signification of the term "due diligence," as applied to a guaranteed note or account, is well understood, and the parties must be assumed to have contracted with reference to that meaning.

2. The court rightly held that the alleged subsequent waiver could not be shown under the pleadings in this cause. The contract itself having fixed upon the plaintiffs a specific duty, the averment in the declaration that the plaintiffs did use due diligence amounted, in effect, to an averment that they had pursued the course which the law imposes upon them in order to charge the guarantor. If they relied on any excuse for failing to use

due diligence, this should have been counted upon in the declaration. Aldrich v. Chubb, 35 Mich. 350.

Judgment affirmed, with costs.

The other Justices concurred.

KEARNES v. MONTGOMERY. 1870.

4 W. Va. 29.

The facts are stated in the opinion of MAXWELL, J.

MAXWELL, J. This was an action of assumpsit, to recover from the defendant the sum of 2,000 dollars, with interest. The facts certified show that on the 28th day of January, 1860, the plaintiff held the bond of the defendant and one J. N. Montgomery for 2,000 dollars; that the defendant, on the day and year aforesaid, proposed to exchange with the plaintiff for the said bond, a bond of 2,000 dollars executed by Thomas Creigh and L. S. Creigh to the plaintiff; that the plaintiff refused to accept the said last mentioned bond unless the defendant would indorse the same, inasmuch as it was payable to the plaintiff and not to the defendant; whereupon the said defendant wrote his name upon the back of the said bond, which was then accepted by the plaintiff, who, in exchange therefor, delivered to the defendant the said bond of the defendant and J. N. Montgomery; that afterwards, and after the institution of the suit, but before the trial, the plaintiff wrote above the blank indorsement of the defendant, a promise binding the defendant as surety of the said Thomas Creigh and L. S. Creigh; that the bond with the indorsement thereon is as follows:

"On or before the first of March, 1861, with interest from the first of March, 1860, we or either of us bind ourselves, our heirs, etc., to pay Alexander Kearnes the just and full sum of two thousand dollars for value received.

"Witness our hands and seals this 28th day of January, 1860.

"THOMAS CREIGH, (Seal.)

"LEWIS S. CREIGH, (Seal.)

For value received, I hereby become the surety of Thomas Creigh and Lewis S. Creigh as obligors in the within bond.

"WM. H. MONTGOMERY."

That the debt against the Creighs could have been made by suit in the year 1861, and after the close of the war in 1865, and that the said Creighs have been insolvent since 1866, and that since that time the debt could not have been made off of them by suit. Upon these facts judgment was rendered for the defendant. The plaintiff in error insists that the judgment is erroneous, because upon the facts proved, the defendant was a surety or maker of the bond in question and primarily liable for its payment, while it is insisted for the defendant that he was a guarantor merely and only liable for the payment of the bond in case the money could not be made off of the makers of the paper after it fell due, by the use of due diligence which, he insists, was not used before the makers became insolvent. Whether the defendant is guarantor or maker depends on the understanding of the parties. If the payee or assignee of paper, not negotiable, indorse his name in blank on the back of it, he is *prima facie* assignor, but if a stranger indorse his name in blank on the back of paper, not negotiable, he is *prima facie* guarantor; but this presumption may be rebutted by showing the original understanding of the parties, by showing an express agreement otherwise, or by showing circumstances from which one may be inferred.

The contract of a guarantor is collateral and secondary. It differs in that respect generally from the contract of a surety which is direct; and in general the guarantor contracts to pay if, by the use of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment and so is responsible at once if the principal debtor makes default. As the proper diligence was not used against the Creighs, if the defendant is guarantor merely he is not liable for the payment of the debt; while if he is to be treated as surety, he is liable. It becomes, therefore, necessary to determine whether he is a technical guarantor merely or a surety.

The plaintiff, after suit brought, wrote over the name of the defendant, "For value received, I hereby become the surety of Thomas Creigh and Lewis S. Creigh as obligor in the within bond." It is upon this contract, so written by the plaintiff, that he claims his right to recover from the defendant. The plaintiff might write anything over the name of the defendant, consistent with the contract of the defendant, so as to carry it out. He could not write the words which he did write, unless

upon special contract between the parties, disclosed by the evidence and surrounding circumstances. The evidence, instead of sustaining and authorizing this special contract as written by the plaintiff, does not even tend to show any such understanding, but on the contrary shows, so far as can be inferred from it, that the defendant was to assume the same situation as to liability that he would have occupied if the paper had been executed to him as payee and transferred by him to the plaintiff. As the facts proved wholly fail to show a contract on the part of the defendant to be liable as maker or surety, it follows that he is liable only as guarantor.

The facts proved show affirmatively that, by the use of due diligence against the Creighs, the plaintiff might have made the money.

The judgment complained of will, therefore, have to be affirmed with damages and costs.

HUNGERFORD v. O'BRIEN. 1887.

37 Minn. 306; 34 N. W. 161.

The plaintiff brought this action in the district court of Otter Tail county upon a promissory note made by the defendant, Charles J. Sawbridge, the payment of which was guaranteed by the defendant O'Brien. The action was tried before BAXTER, J., and a jury, and a verdict directed for plaintiff. Defendant O'Brien appeals from an order refusing a new trial.

DICKINSON, J. The defendant Sawbridge made his negotiable promissory note, which was indorsed to one Gage, who indorsed it in blank to the defendant O'Brien, and he, before maturity, transferred it for value to the plaintiff, indorsing upon the note and signing this guaranty: "For value, I hereby guaranty the payment of the within note to Cassie Hungerford or bearer." The note was not paid. Nothing was done by the plaintiff at the maturity of the note to fix the liability of the indorser Gage. The defendant O'Brien had no notice of the non-payment of the note until more than a year after its maturity. Upon the trial of the issue raised by the answer of the defendant O'Brien, evidence was presented tending to show that the maker of the

note was solvent at the time of its maturity, but has since become insolvent; and that the indorser, Gage, was also solvent. The court directed a verdict for the plaintiff.

The nature of the obligation of the guarantor is affected by the character of the principal contract to which the guaranty relates. The note expressed the absolute obligation of the maker to pay the sum named at the specified date of maturity or before. The guaranty of "the payment of the within note" imported an undertaking, without condition, that, in the event of the note not being paid according to its terms,—that is, at maturity,—the guarantor should be responsible. The non-payment of the note at maturity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand. Such was the effect of the unqualified guaranty of the payment of an obligation which was in itself absolute and perfect and certain as respects the sum to be paid, and the time when payment should be made,—all of which was known to the guarantor, and appears upon the face of the contract. The liability of the guarantor thus becoming absolute by the non-payment of the note, the neglect of the holder to pursue such remedies as he might have against the maker—(the guarantor not having required him to act) would not discharge the already fixed and absolute obligation of the guarantor, nor would neglect to notify the guarantor of the non-payment have such effect. Brown v. Curtiss, 2 N. Y. 225; Allen v. Rightmere, 20 John. 365 (11 Am. Dec. 288); Newcomb v. Hale, 90 N. Y. 326; Read v. Cutts, 7 Greenl. 186, (22 Am. Dec. 184); Breed v. Hillhouse, 7 Conn. 523; Campbell v. Baker, 46 Pa. St. 243; Roberts v. Riddle, 79 Pa. St. 468; Bank v. Sinclair, 60 N. H. 100; Heaton v. Hulbert, 3 Scam. 489; Dickerson v. Derrickson, 39 Ill. 574; Penny v. Crane Mfg. Co., 80 Ill. 244; Clay v. Edgerton, 19 Ohio St. 549; Wright v. Dyer, 48 Mo. 525. See, also Vinal v. Richardson, 13 Allen 521, modifying former decisions of the same court.

It follows that the fact that the maker had become insolvent since maturity, or that a mortgage security had become impaired by depreciation in the value of the property, was no defence; nor was it a defence that the guarantor was not notified of the non-payment of the note. We are aware that the position here taken is opposed by some decisions. No valid agreement was shown between the maker and the plaintiff extending the time

of payment. From the position above taken, it logically follows that the neglect of the guarantee to take the steps necessary to fix the liability of the indorser, Gage, did not discharge the guarantor. The latter, by his unqualified guaranty of the payment of the note, took it upon himself to see that the note was paid, and was therefore not entitled to notice of its non-payment. (Authorities above cited.) For the same reason, the plaintiff did not owe to the guarantor the duty of taking the steps necessary to fix the contingent liability of the indorser by demand and notice of dishonor. Philbrooks v. McEwen, 29 Ind. 347; Lang v. Brevard, 3 Strob. Eq. (So. Car.) 59; Pickens v. Finney, 12 Smedes & M. 468; 2 Lead. Cas. Eq., notes to Rees v. Berrington. No such obligation is involved in this contract of guaranty. Even in the case of an ordinary indorsement, the holder, at maturity, is under no obligation to his indorser to give notice of dishonor to prior indorsers or parties. The last indorser becomes liable when he alone is notified, and he in turn may fix the liability of prior parties by giving notice to them.

Order affirmed.

MITCHELL, J. (dissenting). I am unable to concur in the proposition that the plaintiff owed no duty to O'Brien to take steps, at the maturity of the note, to fix the liability of Gage, the indorser. It does not seem to me that the fact that O'Brien's guaranty of payment was unconditional and absolute is at all decisive of the question. As between the parties to this action, O'Brien occupied the position of surety, who, in case he had to pay the note, would have recourse against Gage, the indorser, provided steps were taken to fix the liability of the latter. The question, therefore, is to be determined by the equitable principles which govern the relative rights and duties of creditor and surety.

It is a well-settled rule of equity that any laches by the creditor in the care or management of collateral remedies or securities, if loss ensues, will discharge the surety *pro tanto*. Nelson v. Munch, 28 Minn. 314, 322 (9 N. W. Rep. 863). As a surety, on payment of the debt, is entitled to all the securities of the creditor, if through the negligence of the creditor who has them in his possession and under his control, a security, to the benefit of which the surety is entitled, is lost or not properly perfected, the surety, to the extent of such security, will be discharged. Wulff v. Jay, L. R. 7 A. B. 756. And we can see no difference

in this respect whether the security is chattel or personal. This is not a case of mere passiveness by the creditor in not taking steps to enforce collection of the debt at maturity, but an omission to take steps to perfect and fix the liability of the indorser, which amounted to positive negligence. He had possession and control of the note on the day of its maturity, and consequently was the only person who could present it for payment, or who would know whether or not it was paid, and hence was the only person in position to give notice to the indorser in case of its non-payment. To require him to do this, would, I think, be both good business morals and good law.

CHAPTER XII.

STATUTE OF FRAUDS.

a. Contracts of suretyship and guaranty, being agreements to answer for the debt, default or miscarriage of another, are within the Statute of Frauds.

HARTLEY v. SANDFORD. 1901.

66 N. J. L. 627; 55 L. R. A. 206; 50 Atl. Rep. 454.

Error to the supreme court to review a judgment in favor of plaintiff in an action brought to enforce a promise to indemnify plaintiff for payments which he had been compelled to make as a surety for defendant's son. Reversed.

The facts are stated in the opinion.

DIXON, J., delivered the opinion of the court:

The material facts in this case, as disclosed by the record, are that the defendant's son was indebted to M., who desired additional security; that hereupon the defendant applied to the plaintiff to become surety for the son, and promised him that, if he was compelled to pay the debt, he (the defendant) would reimburse him; that accordingly the plaintiff became surety for the son, and subsequently was obliged to pay the debt. This suit was brought upon the promise, which was oral only. It appears that at the trial in the Passaic circuit the jury were instructed to find for the plaintiff if they were satisfied the promise had been made; but the question as to the legal sufficiency of the promise was reserved and certified to the supreme court, which

afterwards advised the circuit that the promise was valid, and thereupon judgment was entered on the verdict.

In this court error has been assigned on the charge at the circuit, as well as on the advisory opinion of the supreme court; but, there being no bill of exceptions presenting the charge, the assignment of error respecting it is futile, and must be disregarded. The assignment upon the opinion of the supreme court is legal, and presents the only question now before us, which is whether the plaintiff's suit can be maintained, in view of our statute, "that no action shall be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the person to be charged therewith or some other person thereunto by him or her lawfully authorized." The advice of the supreme court was based upon its opinion that under the adjudications in this state the promise of one person to indemnify another for becoming surety of a third is not within the statute. The cases cited in that opinion to support this view are Apgar v. Hiler, 24 N. J. L. 812; Cortelyou v. Hoagland, 40 N. J. Eq. 1; and Warren v. Abbett (N. J. L.) 46 Atl. 575. Of these, the only one of controlling authority here is that of Apgar v. Hiler, which is a decision of this court. That decision does not sustain the broad proposition for which it was cited. This court there held merely that, between two persons who had signed the same promissory note as sureties for another signer, the oral promise of one surety to indemnify the other was valid. This promise was deemed outside of the statute, because by signing the note the promisor had himself become a debtor, and so his promise to indemnify was to answer for his own debt. In Cortelyou v. Hoagland several stockholders and directors of a corporation had promised to indemnify another stockholder and director for indorsing a corporate note, and Warren v. Abbett was of similar character. In the Cortelyou Case the chancellor rested his decision on Apgar v. Hiler, which, as above stated, was essentially different, and on Thompson v. Coleman, 4 N. J. L. 216, which was a promise to indemnify a constable for selling under execution goods claimed by an outside party,—a case where the promisee had no redress except on the promise, and therefore clearly outside of the statute. If the decisions in Cortelyou v. Hoag-

land and Warren v. Abbett are to be supported on prior New Jersey adjudications, such support must be found in the doctrine that where the consideration of a promise to answer for the debt, default, or miscarriage of another is a substantial benefit moving to the promisor, then the statute does not apply. This rule was recognized in Kutzmeyer v. Ennis, 27 N. J. L. 271, and Cowenhoven v. Howell, 36 N. J. L. 323. To support those decisions on this rule, it must be held that the payment of a corporate debt is substantially beneficial to the stockholders or directors of the corporation,—a proposition which seems to be denied in other tribunals. Browne, Stat. Fr. §164. In the promise now under consideration there was no such element, and no case has been found in our Reports involving the present question. We should therefore decide the matter on principle, or as nearly so as related adjudication will permit. Looked at as *res nova*, it seems indisputable that the defendant's promise was within the statute. It was to respond to the plaintiff in case the defendant's son should make default in the obligation which he would come under to the plaintiff as soon as the plaintiff was to be surety, or to reimburse the plaintiff if he paid it. In this statement of the nature of the promise there is, I think, every element which seems necessary to bring a case within the purview of the statute. The parties, in giving and accepting the promise, contemplated (1) an obligation by a third person to the promisee; (2) that this obligation should be the foundation of the promise, i. e., that the obligation of the son to the promisee should attach simultaneously with the suretyship of the plaintiff, and thereupon should arise the obligation of the promisor for the fulfilment of the son's obligation; and (3) that the obligation of the promisor should be collateral to that of the son, i. e., if the latter should perform his obligation, the promisor would be discharged, while, if the promisor was required to perform his obligation, that of the son would not be discharged, but only shifted from the promisee to the promisor. An examination of the cases will show that not many of them are in conflict with this view, when they are free from differentiating circumstances. In the leading case of Thomas v. Cook, 8 Barn. & C. 728, such a circumstance appears in the fact that the promisor was himself a signer of the bond against which he promised to indemnify the promisee, and thus the promise was, in a reasonable sense, to answer for that which,

as to the promisee, was the promisor's own debt. On this difference may be explained the decisions in Jones v. Letcher, 13 B. Mon. 363; Horn v. Bray, 51 Ind. 555, 19 Am. Rep. 742; Barry v. Ransom, 12 N. Y. 462; Sanders v. Gillespie, 59 N. Y. 250; Ferrell v. Maxwell, 28 Ohio St. 383, 22 Am. Rep. 393; and others,—resting on the rule applied in Apgar v. Hiler, 24 N. J. L. 812. The remark of BAYLEY, J., in Thomas v. Cook, that a promise to indemnify was not within either the words or the policy of the statute, has caused much of the confusion existing on this subject, but it is more than counterbalanced by the observations of Lord Denman in Green v. Cresswell, 10 Ad. & El. 453, and Pollock, C. B., in Cripps v. Hartnoll, 4 Best & S. 414, to the effect that a promise to indemnify may be also an undertaking to answer for the debt or default of another, and that when it is it comes within the operation of the statute. Another circumstance taking cases out of the simple class with which we are now concerned is that mentioned in Kutzmeyer v. Ennis, 27 N. J. L. 371, 376, viz., the existence of a new consideration beneficial to the promisor, or, as it is sometimes expressed, moving to the promisor. Such cases are Smith v. Sayward, 5 Me. 504; Lucas v. Chamberlain, 8 B. Mon. 276; Mills v. Brown, 11 Iowa 314; Reed v. Holcomb, 31 Conn. 360; Smith v. Delaney, 64 Conn. 264, 29 Atl. 496; Potter v. Brown, 35 Mich. 274; Comstock v. Norton, 36 Mich. 277; Marrison v. Sawtel, 10 Johns. 242, 6 Am. Dec. 337; Sanders v. Gillespie, 59 N. Y. 250, Tighe v. Morrison, 116 N. Y. 263, 5 L. R. A. 617, 22 N. E. 164. Cases of still another character are sometimes cited in support of the statement that contracts to indemnify are outside of the statute, such as Cripps v. Hartnoll, 4 Best & S. 414; Reader v. Kingham, 13 C. B. N. S. 344; Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Keesling v. Frazier, 119 Ind. 185, 21 N. E. 552; Beaman v. Russell, 20 Vt. 205, 49 Am. Dec. 775. But these judgments rest on the same idea as Thompson v. Coleman, 4 N. J. L. 216,—that there existed no other liability to the promisee than that of the promisor, and so manifestly the statute was not applicable. On the other hand, there is sufficient judicial authority for the proposition that an undertaking to indemnify a person for becoming surety for another is, in the absence of any modifying fact, a promise within the statute. Green v. Cresswell, 10 Ad. & El. 453; Simpson v. Nance, 1 Speers L. 4; Brown v. Adams, 1 Stew.

(Ala.) 51, 18 Am. Dec. 36; Kelsey v. Hibbs, 13 Ohio St. 340; Clement's Appeal, 52 Conn. 464; Bissig v. Britton, 59 Mo. 204, 21 Am. Rep. 379; Nugent v. Wolfe, 111 Pa. 471, 56 Am. Rep. 291, 4 Atl. 15; Draughan v. Bunting, 31 N. C. (9 Ired. L.) 10; Hurt v. Ford, 142 Mo. 283, 41 L. R. A. 823; 44 S. W. 228; and May v. Williams, 61 Miss. 126, 48 Am. Rep. 80,—were decided on this basis. In the case last mentioned, COOPER, J., stated the true rules very clearly and concisely. No doubt, there are opposing cases which cannot be explained on any distinguishing circumstances. Such seem to be Chapin v. Merrill, 4 Wend. 657; Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216; Dunn v. West, 5 B. Mon. 376; Vogel v. Melms, 31 Wis. 306, 11 Am. Rep. 608; and Wildes v. Dudlow, L. R. 19 Eq. 198. But some of these cases merely follow Thomas v. Cook, 8 Barn. & C. 728, without noticing the distinction which later discussion has justified, while others appear to have been induced by the injustice of a refusal to enforce a promise on the strength of which the promisee incurred his liability, rather than by a ready purpose to execute the will of the legislature.

No doubt, injustice may result from the enforcement of the statutory rule; but that rule sprang from a conviction that its adoption would prevent more wrong than it would permit, and its enactment in England and perhaps every state in this Union indicates the generality of this assurance. Said Mr. Justice STERETT in Nugent v. Wolfe, 111 Pa. 471, 56 Am. Rep. 291, 4 Atl. 15: "The object of the statute is protection against 'fraudulent practices commonly endeavored to be upheld by perjury,' and it should be enforced according to its true intent and meaning, notwithstanding cases of great hardship may result therefrom." With more detail did Chief Justice SHAW, in Nelson v. Boynton, 3 Met. 396, 37 Am. Dec. 148, say: "The object of the statute, manifestly, was to secure the highest and most satisfactory species of evidence in a case where a party, without apparent benefit to himself, enters into stipulations of suretyship, and where there would be great temptation on the part of a creditor, in danger of losing his debt by the insolvency of his debtor, to support a suit against the friends or relatives of a debtor,—a father, son or brother,—by means of false evidence, by exaggerating words of recommendation, encouragement to forebearance, and requests for indulgence into positive contracts."

Our conclusion is that the promise proved at the trial was insufficient to sustain the action, that the judgment for the plaintiff should be reversed, and that, in accordance with the reservation at the trial, a verdict and judgment should be entered in favor of the defendant.

DEXTER v. BLANCHARD. 1865.

11 Allen 365.

Contract brought upon an oral promise by the defendant to pay to the plaintiff a bill for the hire of horses and carriages, and for injury to a wagon.

At the trial in the superior court, before Morton, J., the plaintiff offered to prove that the horses and carriages were hired and the injury done by the defendant's minor son, to whom the credit therefor was given; and that not long after the date of the last charge the defendant's son became sick, and while so sick the plaintiff several times demanded payment of him, and thereupon the defendant verbally promised to pay the plaintiff's bill if the plaintiff would not trouble his son any further; to which the plaintiff agreed. The son afterwards died. It was admitted that the bill was not for necessaries.

The judge ruled that upon these facts the action could not be maintained, and a verdict was returned accordingly for the defendant. The plaintiff alleged exceptions.

Bigelow, C. J. The ruling of the court was in accordance with well established principles. The defendant's promise, although it may have been made on a good consideration as to the plaintiff, was nevertheless a promise to pay the debt of another, and no action can be maintained upon it. Gen. Sts., c. 105, §1. The fallacy of the argument urged in behalf of the plaintiff lies in the assumption that there was in fact no debt due from the son of the defendant, because he was a minor at the time he undertook to enter into a contract with the plaintiff. A debt due from a minor is not void; it is voidable only; that is, it cannot be enforced by a suit at law against the contracting party, on plea and proof by him of infancy. But it is voidable only at the election of the infant, and until so avoided it is a

valid debt. Nor can a third person avail himself of the minority of a debtor to obtain any right of security or title. Infancy is a personal privilege, of which no one can take advantage but the infant. Kendall v. Lawrence, 22 Pick. 540; Nightingale v. Withington, 15 Mass. 274; McCarty v. Murray, 3 Gray 578.

The effect of the doctrine contended for by the counsel for the plaintiff would be that a verbal agreement to answer for the debt of another would be valid, if it could be shown that the original contracting party could have established a good defence to the debt in an action brought against him. We know of no principle or authority on which such a proposition can be maintained. It certainly would open a wide door for some of the mischiefs which the statute of frauds was designed to prevent.

The case for the plaintiff derives no support from the argument based on proof of an agreement by the plaintiff to forbear to sue the defendant's son, in consideration of the promise of the latter to pay the debt. It is perfectly well settled that it is not a sufficient ground to prevent the operation of the statute of frauds, that the plaintiff has relinquished an advantage or given up some lien or claim in consequence of the defendant's promise, if that advantage or relinquishment did not also directly enure to the benefit of the defendant. It is only when such relinquishment or surrender operates to transfer to the defendant the right, interest or advantage which the plaintiff gives up, or to create in the defendant some title or benefit derived from that which the other party surrenders, that the promise can be regarded as an original undertaking, and not within the statute. Curtis v. Brown, 5 Cush. 488, and cases cited.

Exceptions overruled.

BALDWIN v. HIERS. 1884.

73 Ga. 739.

L. S. Baldwin brought suit against Charles Hiers, and John A. Hiers, as guarantor, in a justice's court, on March 22, 1881. The account attached to the summons was in the name of Charles Hiers. The justice entered judgment for the plaintiff, an ap-

peal was entered, the jury found for the plaintiff, and a *certiorari* was sued out by the defendant, John A. Hiers. The evidence for the plaintiff on the trial in the justice's court was that Charles Hiers was the minor son of John A. Hiers; that the latter told plaintiff to let Charles and another son have goods and charge them to the one who purchased them; to let them have goods and he (John A.) would see that the plaintiff got the money for them; and the goods were furnished accordingly.

Defendant, John A., denied any such agreement, or that he owed the account, and testified that the son worked for himself during the year. The son denied the correctness of the account, and asserted that he purchased most of the goods charged, but that some of the account was really for whisky, though charged under other names.

The court sustained the *certiorari* and ordered a new trial. Plaintiff excepted.

Blandford, Justice.

(1) The plaintiff sued the defendant in a justice's court as guarantor, and obtained a verdict in his favor. The evidence showed that the son of the defendant wished to purchase goods from the plaintiff, and the defendant agreed if plaintiff would let defendant's son have the goods he, defendant, would see it paid. This was an original and not a collateral undertaking. If the promise had been that he would pay the debt if his son did not, then such a promise would be void unless reduced to writing; it would be a promise to answer for the debt, default or miscarriage of another, but an undertaking that if plaintiff would let defendant's son have goods, he would see it paid, or would pay it himself, is an original undertaking, founded on a sufficient consideration, and is good and binding on defendant.

(2) And the defendant being sued in a justice's court as guarantor would make no difference, as there are no pleadings in that court.

(3) We think the evidence was sufficient to sustain the verdict and judgment in the justice's court, and would have been satisfied if the court below had allowed the same to stand, but as the court thought proper to reverse and set aside the judgment of the justice's court, we will not interfere, as this is equivalent to the first grant of a new trial. The court below is nearer the parties and witnesses than we are. The testimony

is conflicting, and we will let the judgment of the court below stand.

Judgment affirmed.

UNION BANK v. COSTER'S EXECUTORS. 1850.

3 N. Y. 203, 53 Am. Dec. 280.

On the 29th of May, 1841, Heckscher & Coster, merchants of the city of New York, executed and sent to Kohn, Daron & Co., merchants in New Orleans, a letter of credit as follows:

"New York, May 29, 1841.

"Sir: We hereby agree to accept and pay at maturity any draft or drafts on us at sixty days' sight, issued by Messrs. Kohn, Daron & Co. of your city, to the extent of twenty-five thousand dollars, and negotiated through your bank. We are respectfully, sir, your obd't serv'ts,

"HERKSCHER & COSTER."

At the foot of the letter of credit was a guaranty executed at the same time by John G. Coster, as follows:

"I hereby guarantee the due acceptance and payment of any draft issued in pursuance of the above credit.

"JOHN G. COSTER."

On the faith of the above letter of credit and guaranty, the Union Bank of Louisiana, in January, 1842, purchased two drafts drawn by Kohn, Daron & Co., on Heckscher & Coster, amounting to about $9,000, which were accepted and paid by the latter according to their agreement. On the 14th of February, 1842, the bank, under the same letter of credit, purchased another draft for $4,000, at sixty days' sight, drawn by and upon the same parties; and on the 26th of that month this draft was presented to Heckscher & Coster, in New York, for acceptance, which they refused. On the 9th of April, 1842, the attorney for the Union Bank gave notice to John G. Coster that he had received the draft for collection, and on the 2d of May, 1842, formal notice of the protest of the draft for non-payment was served on Mr. Coster. In August, 1844, John G. Coster died, and the Union Bank subsequently brought this suit

in the superior court of the city of New York, against his executors, upon the guaranty above set forth, for the purpose of recovering the amount of the draft. On the trial, in addition to the facts already stated, it appeared that prior to any of the above mentioned transactions with the Union Bank, the said letter of credit and guaranty had been held by the City Bank of New Orleans, which, upon the faith thereof, in December, 1841, had purchased a draft of $10,000 drawn by Kohn, Daron & Co. upon Heckscher & Coster. The letter and guaranty were not addressed to any particular person or bank.

Pratt, J., delivered the opinion of the court. Contracts of guaranty differ from other ordinary simple contracts only in the nature of the evidence required to establish their validity. The statute requires every special promise to answer for the debt, default or miscarriage of another, to be in writing subscribed by the party to be charged thereby, and expressing therein the consideration; and no parol evidence will be allowed as a substitute for these requirements of the statute. But in other respects the same rules of construction and evidence apply to contracts of this character which apply to other ordinary contracts. Hence the consideration which will support a contract of this character, as in other cases, may consist in some benefit to the promisor, or some other person at his request, or some trouble or detriment to the promisee. (20 Wend. 184, 201; Theobald on Pr. & Surety, 3, 4; 2 H. Bl. 312.) Nor is any particular form of words necessary to be used for expressing the consideration; but it is enough if from the whole instrument the consideration expressly or by necessary inference appears; so that it be clear that such and no other was the consideration upon which the promise was made. (24 Wend. 35; 21 id. 628; 4 Hill 200; 8 Ad. & El. 846; 5 Barn. & Ad. 1109.) And the rule allowing two or more instruments given at the same time and relating to the same subject matter to be construed together as one instrument, applies also to this class of contracts; so that when a guaranty is given at the same time with the principal contract and forms a part of the entire transaction, if the consideration be stated in the principal contract, though none be stated in the guaranty, it will suffice. 8 John. 35; 9 Wend. 218; 18 id. 114. So also as in other cases, parol evidence of the circumstances under which the contract was made may be given, to aid the court in giving a true con-

struction to ambiguous terms therein, or to show that separate contracts relate to the same subject matter.

It should also be observed here, that our statute in terms only requires the contract to express therein what it had been well settled the statute of Elizabeth required it to contain, and the same rules of construction should therefore be applied in cases under both statutes. 24 Wend. 35.

With these observations in relation to the law governing cases of this kind, we come to the consideration of the contract in question.

The letter of credit of Heckscher & Coster is an original undertaking on the face of it to accept any drafts to be drawn upon them at sixty days by Kohn, Daron & Co., to the extent of $25,000, and negotiated by the bank to whom it is addressed. The consideration of their undertaking appears very plainly from the instrument. It is an open proposition to the bank to which it is addressed, that if it will purchase the drafts drawn by Kohn, Daron & Co., they will accept and pay the same. As soon therefore as the bank complied with the proposition the contract was closed, and the rights and liabilities of the parties became fixed. Upon this part of the contract there can be no question that a sufficient consideration appears upon the face of the contract to uphold it. But it requires no greater or different consideration to support a guaranty than to support an original promise. The only difference in the two cases consists in the former requiring the consideration to appear upon the contract itself, whereas the consideration to support the latter may be proved by parol. The question therefore in this case is whether the consideration of the undertaking of the defendants' testator appears upon the instrument itself, or rather whether the two instruments may be read together so that the same consideration shall support both.

The guaranty is without date and at the foot of the letter of credit. Independent of the parol testimony it should be deemed to have been made at the same time. It is addressed to the same person and relates to the same subject matter. It should therefore, within every rule of construction, be deemed part of the same transaction, and the two instruments should be read together as one contract. The two would read thus: "In consideration that you, the Union Bank of Louisiana, will purchase any draft or drafts to be issued by Kohn, Daron & Co.,

upon Heckscher & Coster, at sixty days, not exceeding, $25,000, we the said Heckscher & Coster will accept and pay the same; and I the said John G. Coster agree that Heckscher & Coster shall accept and pay the same." Now it seems to me clear that such is the fair reading of the two contracts taken together; and although the contract of John G. Coster may be deemed collateral, yet had the two been drawn in the above form no question could have been raised upon the statute of frauds. But what may be fairly inferred from the terms of a contract should be considered, for the purpose of giving it effect, as contained in it; and this rule applies as well to collateral as to original undertakings. 5 Hill, 147.

There is a wide difference between the guaranty of an existing debt and the guaranty of a debt to be contracted upon the credit of the guaranty. It is the difference between a past and future consideration. A past consideration, unless done at the request of the promisor, is not sufficient to support any promise. But a promise to do an act in consideration of some act to be done by the promisee implies a request, and a compliance on the part of the latter closes the contract and makes it binding. And although it may be necessary from the nature of the case to prove performance by parol, yet such evidence is no violation of the statute requiring the consideration to be in writing. The consideration of the promise is expressed, and the parol evidence is only used to show, not what the consideration is, but that the act which constitutes that consideration has been performed. Any other rule would require every person to whom a letter of credit is directed to accept the same in writing before the drawer would be bound. For instance, a letter drawn in the country and addressed to a merchant in the city, guaranteeing the responsibility of the person for whose benefit the same was drawn for a given bill of goods to be sold to him, would require a written acceptance by the city merchant before it would be binding upon the drawer. No such strict rule can be found supported by any adjudication. I am therefore satisfied that the consideration of the guaranty in the case at bar sufficiently appears in the contract, and that the same was valid and binding upon the defendants' testator. I have not been able to find a case in our own or the English courts which would conflict with the doctrine above advanced; but on the contrary, the books are full of cases similar in their circumstances to this case,

where the guaranty has been sustained. 8 John. 35; 11 id. 221; 10 Wend. 218; S. C. in error, 13 id. 114; 12 id. 218; 24 id. 35; 4 Hill 200; 4 Denio 559; 1 Ad. & D. 57; 5 Bligh's N. R. 1; 7 Mees. & Wels. 410; 9 East 348; 1 Camp. 242; 3 Brod. & Bing. 211; 4 C. & P. N. P. 59; 8 Dowl. & Ryl. 62.

The next question raised in the case is as to notice of acceptance. We must hold the law to be settled in this state that where the guaranty is absolute no notice of acceptance is necessary. Judge COWEN in Douglass v. Howland, (24 Wend. 35,) and Judge BRONSON, in Smith v. Dann (6 Hill, 543), examined the cases at length upon this question, and they showed conclusively that by the common law no notice of the acceptance of any contract was necessary to make it binding, unless it be made a condition of the contract itself, and that contracts of guaranty do not differ in that respect from other contracts. In this case the only condition of Coster's undertaking was that the bank should purchase the drafts to be issued by Kohn, Daron & Co., and upon complying with that condition the rights of the parties became fixed, and the contract binding. There is nothing in the contract from which we can infer that it was the intention of the parties that notice should be given in order to fix the guarantor. No more is required to make the guarantor liable than to make Heckscher & Coster, and the only notice to them necessary was the presentment of the drafts for their acceptance within a reasonable time. Allen v. Rightmere, 20 John. 365; Clark v. Burdett, 2 Hall 197; Cro. Jac. 287, 685; 2 Salk. 457; Vin. Ab. Notice, A. 3; Com. Dig. Plead. C. 75; 2 Chitty 463.

As to notice of non-acceptance and non-payment of the bills by the drawees, that can only involve the subject of laches on the part of the holders of the drafts, and all the cases, both in England and in this country, concur in holding that this defense can only be set up to an action against the surety in cases where he has suffered damage thereby, and then only to the extent of such damage. 7 Peters 117; 12 id. 497; 1 Mason 323, 368; 1 Story 22; 13 Conn. 28; 5 Man. & Gran. 559; 13 Mees. & Wels. 452; 3 Kent's Com. 122. If, therefore, it were necessary in this case to give any notice, no evidence has been given showing that the defendants, or the guarantor, suffered any loss in consequence of the want of such notice.

The only remaining question, therefore, worthy of considera-

tion in this case, arises out of the fact that another bank had previously purchased drafts drawn in pursuance of the letter of credit and guaranty. It is claimed that by such purchase the contract became a fixed and binding contract between such bank and the promisor, and thereby lost its negotiable character, and became located so that no other person or bank could purchase drafts upon the credit of it.

The guaranty, in this case, was manifestly intended to accompany the letter of credit, and is subject, in this respect, to the same construction. If, therefore, it was competent for Kohn, Daron & Co., to draw several drafts not exceeding the limit in the bill of credit specified, and to negotiate them at different banks, and Heckscher & Coster would be bound by their letter of credit to accept and pay them, the guarantor would also be liable to the same extent. As a general rule the surety is liable to the same extent as the principal, unless he expressly limits his liability. (Theobold on Prin. and Surety 46.) It therefore only becomes necessary to examine the letter of credit, and ascertain whether it was intended to be limited to one particular bank, or is a general letter of credit to any and all persons who may advance money upon it. It is somewhat singular that we find so few adjudications in our courts upon a class of commercial instruments which enter so largely into the commerce and business of this country, and of the world.

In England it seems to be at this time questionable whether a party who advances money upon a general letter of credit can sustain an action upon it. Russell et. al. v. Wiggins, 2 Story 214; Bank of Ireland v. Archer, 2 Mees. & Welsby 383. The reason assigned is that there is no privity of contract between them. It is there assumed that it is only a contract between the drawer of the letter and the person for whose benefit it is drawn. But in this country the contrary doctrine is well settled. Letters of credit are of two kinds, general and special. A special letter of credit is addressed to a particular individual by name, and is confined to him, and gives no other person a right to act upon it. A general letter, on the contrary, is addressed to any and every person, and therefore gives any person to whom it may be shown authority to advance upon its credit. A privity of contract springs up between him and the drawer of the letter, and it becomes in legal effect the same as if addressed to him by name. Russell v. Wiggins, 2 Story's Rep.

214; 12 Mass. 154; 2 Metcalf 381; 12 Wend. 393; 12 Peters 207; Burkhead v. Brown, 5 Hill 641; Story on Bills; see Beames' Lex. Mer. 444.

But these general letters of credit may be subdivided into two kinds those that contemplate a single transaction, and those that contemplate an open and continued credit, embracing several transactions. In the latter case they are not generally confined to transactions with a single individual, but if the nature of the business which the letter of credit was intended to facilitate, requires it, different individuals are authorized to make advances upon it, and it then becomes a several contract with each individual to the amount advanced by him. Thus a general letter of credit may be issued to a person to enable him to purchase goods in the city of New York, for a country store. The very nature of the business requires him to deal with different individuals and houses in order to obtain the necessary assortment. It has never, as I am aware, been questioned that the guarantor might be bound to several persons who should furnish goods upon the credit of the letter.

So letters are issued by commission houses in the city, to enable persons to purchase produce in the western states. The money is obtained from the local banks in those states by drafts drawn upon those houses and upon the faith of the letters of credit. It may often happen that a single bank can not furnish the requisite amount, or it may be necessary to use money in different and distant localities. I am not aware of any question ever having been raised as to the authority of different banks to act upon the same letter of credit. It is absolutely necessary that such should be the effect of them in order to facilitate the commerce of the country, and to carry out the object of the parties in issuing the letters of credit. Brukhead v. Brown, 5 Hill 641; 2 Story's Rep. 214.

The letter of credit in this case was evidently intended to be general; it did not contemplate a single transaction, or draft for the whole amount, but several drafts limited in the aggregate to twenty-five thousand dollars. Although the address "sir," and "your bank," is in the singular number, yet I think it was intended to be used in a distributive sense, and apply to any bank or banks who should purchase the drafts. I can see no object which the drawers should have for limiting the party for whose benefit the letter was issued to a single bank. It is

said that it would enable them more readily to revoke the authority. But these letters are not issued without either undoubted confidence in the persons for whose benefit they are drawn, or upon ample security. The idea of giving notice of revocation to any party but that for whose benefit they are drawn, is never entertained by the guarantors in cases of general letters. When they wish to provide for any such contingency the letters are framed accordingly. Again, in this case the parties themselves have treated this letter as not limited to a single bank, for they accepted bills, which had been discounted by the plaintiffs.

I am, therefore, satisfied that the plaintiffs were authorized to purchase bills upon the faith of the letter and accompanying guaranty, and that the previous purchase of bills by another bank is no defense.

Whether the letters had been revoked with the knowledge of the plaintiffs before the draft was discounted by them, was a question of fact for the jury. It would clearly constitute no defense unless the plaintiffs had notice of it. The judgment of the superior court must therefore be affirmed with costs.

Judgment affirmed.

CHAPTER XIII.

EQUITY WILL COMPEL PRINCIPAL TO PAY.

a. The surety may in equity compel the principal to pay the debt on which the former is only secondarily liable.

DOBIE v. FIDELITY & CASUALTY CO. 1897.

95 Wis. 540; 70 N. W. Rep. 482, 60 Am. St. Rep. 135.

NEWMAN, J. The question presented is whether the complaint states a cause of action. The action is by a surety to compel his principal to pay the debt for which both are liable, for the exoneration of the surety. It is ultimately the defendant's liability. That party is the principal debtor, who is ultimately liable for the debt. The question is whether a surety can, in equity, compel his principal to exonerate him from liability, by extinguishing the obligation, without having first paid it himself. It seems to be well settled that a surety against

whom a judgment has been rendered may, without making payment himself, proceed in equity against his principal to subject the estate of the latter to the payment of the debt, in exoneration of the surety. 2 Beach Eq. Jur. § 903; 3 Pom. Eq. Jur. § 1417; Will. Eq. Jur. 110; United New Jersey Railroad & Canal Co. v. Long Dock Co., 38 N. J. Eq. 142; Beaver v. Beaver, 23 Pa. St. 167; Gibbs v. Mennard, 6 Paige 258; Warner v. Beardsley, 8 Wend. 194; 7 Am. & Eng. Enc. Law, 486, cases in note. The judgment of the superior court of Douglas county is affirmed.

WENDLANDT v. SOHRE. 1887.

37 Minn. 162; 33 N. W. Rep. 700.

Appeal from district court, Blue Earth county.

MITCHELL, J. The parties to this action had been partners in business, and in that capacity contracted a debt of $170 to William Deering & Co., for machinery purchased. Subsequently the partnership was dissolved, and a full accounting and settlement had, and all matters pertaining to the partnership business, both as between the partnership and third persons, and between the partners, themselves, were, as was supposed, fully considered, settled, and adjusted. But, by inadvertence, this debt to Deering & Co., was overlooked, and left unpaid. When this debt became due, payment being demanded of plaintiff, he paid one-half of it, and requested Deering & Co., to demand payment of the other half from defendant. This was done, but defendant refused to pay. Thereupon plaintiff brought this action to compel defendant to pay Deering & Co., the remaining half of the debt, so that plaintiff might be relieved of liability.

If, as between plaintiff and defendant, the former bears the relation of surety for the latter, there can be no doubt of his right to maintain this action. As soon as a surety's obligation to pay becomes absolute he is entitled in equity to require the principal debtor to exonerate him; and he may file a bill to compel this although the creditor has not molested him, it being unreasonable that a man should always have such a cloud hanging over him. Theob. Prin. & Sur. 169; Brandt Sur. § 192.

This familiar rule of equity practice is incorporated into our statutes. Gen. St. 1878, c. 66, § 130.

The court below, however, sustained the demurrer to the complaint upon the ground that the relation of principal and surety did not exist between these parties, that they were simply joint debtors, and that plaintiff's only remedy was an action for contribution, after paying the entire debt. In this we think the court erred. Undoubtedly both plaintiff and defendant are, in their relations to William Deering & Co., joint debtors and principals. But this is unimportant. The relation of principal and surety is fixed by the arrangements and equities between the debtors or obligors themselves. It is also true that, when they contracted this debt as partners, the plaintiff and defendant were *inter se* joint debtors. But parties who contract a debt as partners or joint debtors may, by reason of subsequent arrangements or transactions in reference to the debt, become, as between each other, principal and surety. For example, a retiring member of a firm becomes surety of the other partners, who assume the firm debts. Brandt Sur. 23; 3 Pom. Eq. Jur. §§ 1417, 1418.

The question is not what relation do the debtors bear to the creditor, nor even in what relation did they contract the debt, but what relation do they now bear to each other in respect to it. A surety is any person who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have paid it before the surety was compelled to do so. Whenever, as between two debtors, liable to the creditor for the same debt, it is the debt of one of them, the other may be said to be his surety. Smith v. Shelden, 35 Mich. 48. This is precisely the case here. The partnership business has been fully and finally adjusted and settled except this one debt, which was accidentally overlooked. As between the parties, each should have paid one-half of it. Plaintiff has paid his half; defendant should pay the other half. Hence as to that half plaintiff bears to defendant the relation of surety, and as such is entitled to maintain this action for indemnity.

The respondent in his argument confounds this action with one for contribution. Whether the creditor should have been made a party to this action is not before us, no such question being raised by the demurrer.

Berry, J., owing to illness, took no part in the decision of this case.

CHAPTER XIV.
EFFECT OF DEATH OF SURETY.

a. At common law the death of a surety discharged his estate from liability.

RISLEY v. BROWN. 1876.
67 N. Y. 160.

The nature of the motion and the facts sufficiently appear in the opinion.

Earl, J. This is a motion for an order substituting the administrator of Abner Brown as defendant, he having died during the pendency of the appeal to this court.

The action was upon a joint promissory note made by the defendants, Abner Brown signing simply as surety. The principal interposed no defense. The action was tried before a referee, and the plaintiff recovered judgment, and judgment was entered against both defendants. Abner Brown alone appealed to the General Term of the Supreme Court, and there the judgment was affirmed. He then appealed to this court, and filed the usual undertaking providing for the payment of the judgment, if it was affirmed or the appeal dismissed. Pending the appeal, he died, and an administrator has been appointed upon his estate.

The substitution ought not to be made. It is the settled law of this State that upon the death of one of the makers of a joint promissory note, who was not liable for the debt irrespective of the joint obligation, but who signed the note simply as surety, his estate is absolutely discharged, both in law and equity (Getty v. Binsse, 49 N. Y. 385); and it makes no difference that the surety died after a joint judgment against him and the principal. (The United States v. Price, 9 How. (U. S.) 83). In the latter case, the action was upon a joint and several bond against principal and surety, and a joint judgment was recovered. The surety then died, and it was held, the obligee having treated the bond as joint by bringing an action

thereon against principal and surety jointly, and the bond being merged in the judgment which was a joint obligation, that his estate was discharged, both in law and equity. It is, therefore, unquestioned that the judgment appealed from cannot be enforced against the estate of Abner Brown.

But the claim is made that the giving of the undertaking upon the appeal altered the position of the surety, and imposed upon him an independent liability to pay the judgment in case of its affirmance; but the difficulty with this claim is that the judgment can never be properly affirmed. As the judgment can never be enforced against the estate of a surety, there can be no propriety in substituting his administrator. As the estate is absolutely discharged from all liability upon the judgment, we should not continue the appeal simply for the purpose of enabling the plaintiff, in case of affirmance, to bring an action upon the undertaking. But it must be true that whatever discharges the estate of a surety in such a case from the judgment, also discharges it from the undertaking. There can be no liability upon the undertaking given, after the judgment has been destroyed or discharged, either by the act of the parties or the operation of law. It is quite inadmissible to construe the undertaking to mean that the surety would pay the judgment, even if he or his estate would, after the giving of the undertaking, be discharged from all liability upon the judgment.

The motion must be denied, without costs.

All concur.

Motion denied.

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b. In case of a continuing guaranty the death of the surety revokes the guaranty, upon notice to the creditor.

HYLAND v. HABICH. 1889.

150 Mass. 112; 22 N. E. Rep. 765; 6 L. R. A. 383; 15 Am. St. Rep. 174.

Bill to redeem lands from a mortgage. The defendant, Habich, was a resident of Germany. Bridget Hyland gave defendant a mortgage to secure all indebtedness which her husband, Matthew, was then under to the defendant, "and also the price or value of all such wares, goods, or merchandise as may be purchased

or consigned to said ~~Habich~~ Hyland, and all notes and obligations given or to be given therefor." On October 17, 1887, Bridget Hyland died, and the fact of her death was made known to defendant on the same day. The question was, whether any order to affect a redemption was necessary for the plaintiff to pay indebtedness arising from sales made to the mortgagor's husband after her death.

Knowlton, J. The mortgage, which under the agreed statement of facts the plaintiffs seek to redeem, was given to secure the payment,—1. Of an existing indebtedness due from Matthew Hyland; and 2. Of such indebtedness as might afterwards accrue from the sale or consignment of goods to said Hyland. The debt then existing was long ago paid, and we need to consider only that part of the mortgage which relates to the indebtedness thereafter to be contracted.

The language of the condition in the mortgage impliedly gave the mortgagee a right to sell goods to said Hyland for an indefinite time upon the faith of this security. It was like an ordinary continuing guaranty of payment for goods to be sold, except that, instead of a personal undertaking to pay as a guarantor, it was a transfer of the estate as security for the payment. The mortgagee had the same right to sell, trusting to the security, and there were the same limitations upon his right as if the mortgagor had given merely a personal continuing guaranty. He had an implied authority from the owner of the mortgaged estate, which was subject to revocation at any time, and which would be revoked by the death of the owner. The principles laid down in Jordan v. Dobbins, 122 Mass. 168, are decisive of this case.

The defendants urge that a conveyance of property as security implies that the authority to sell is to continue after the death of the owner, until the owners of the estate see fit to revoke the authority. But we see no good ground for this contention. If the security were by a mortgage of personal property, there would be no one after the death of the mortgagor who could revoke the authority until the appointment of an administrator. In the meantime, the property might be charged to its full value. And if the mortgage were of real estate, different heirs might disagree as to the action to be taken. We are of opinion that the right to sell upon the faith of the guaranty rests upon a continuing authority, and that, where a mortgage is given, in-

stead of a personal promise as security, the authority proceeds from the mortgagor, and is terminated by his death. Even in England, where it is held that such a guaranty is terminated, not by the death of the guarantor, but by notice of his death, the knowledge which the mortgagee in the present case had of the death of the mortgagor would be deemed constructive notice sufficient to determine his right to sell on the faith of the security. Harriss v. Fawcett, L. R. 15 Eq. 311; L. R. 8 Ch. 866; Coulthart v. Clementson, 5 Q. B. Div. 42, 47; Lloyd v. Harper, 16 Ch. D. 290, 314, 319.

Under the agreement of the parties, the plaintiffs are entitled to redeem upon the payment of $1,490, with interest from July 28, 1888, and costs.

Decree accordingly.

JOHNSON v. HARVEY. 1881.

84 N. Y. 363; 38 Am. Rep. 515.

Appeal from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made October 5, 1880, which affirmed an order of Special Term overruling defendant's exceptions to the report of a referee, to whom a claim against the estate of John G. Allen, defendant's intestate, was referred under the statute, and confirming said report.

The nature of the claim and the facts appear sufficiently in the opinion.

FINCH, J. The plaintiff and the defendant's intestate, in the lifetime of the latter, were joint sureties in an undertaking given in an action for the claim and delivery of personal property, in which action one Parshall was plaintiff and the sheriff of Erie county defendant. Neither of the sureties were parties to that action, but executed the undertaking for the accommodation of the sheriff, or those claiming through him. Before a trial of that litigation one surety, John G. Allen, died, and the present defendant was duly appointed his administrator, and thereafter judgment was obtained in the action in which the undertaking was given, and the surviving surety, by reason of

his liability thereon, compelled to pay the sum of $1,592.74. For the one-half part of this he now claims contribution from the estate of his co-surety, and the sole question presented and argued is, whether such contribution can be enforced. The question is hardly an open one in this State. It was held in Bradley v. Burwell (3 Den. 61) that the death of one of two or more sureties did not relieve his estate from the liability to contribute, and the decision was put upon the ground that the law implies a contract between co-sureties to contribute ratably toward discharging any liability which they may incur in behalf of their principal, such contract originating at the time they execute the original undertaking, and that in the case of the death of either, this obligation devolves upon his legal representatives, and is like any other contract made by one, in his life-time, to pay money at a future time, absolutely or contingently, who dies before any breach of the contract. The English cases on the subject were cited in the opinion of the court, as also those of Massachusetts; and it is also to be observed that, in the argument there made, the case of Waters v. Riley (1 Harr. & Gill. 305) was cited by the learned counsel who contended against the liability of the deceased surety's estate, as it is again brought to our attention here. That case was decided by a divided court, and, like the authorities in Pennsylvania, went upon the ground that the liability of the sureties to each other rested, not upon contract express or implied, but was the product and the mere creature of equity. In Bradley v. Burwell the same ground was distinctly taken on the argument, and advocated by an ability which never left unsaid what was worthy to be uttered, and yet the court determined that the liability of the co-surety rested upon an implied contract to contribute, originating at the date of the joint signature, and which bound the estate of one or more who died before the principal liability accrued. The learned counsel for the appellant seems to have been led into a doubt of the authority of Bradley v. Burwell, and to a hope that we would disregard it, from what has been said by us in cases where the creditor, and not the co-surety, was pursuing a supposed remedy against the estate of a deceased surety. In those cases, which were cases of joint obligation, we have held that such estate is absolutely discharged, both in law and equity; that death puts an end to the obligation of the surety; that the survivor only is liable;

stating the conclusion with some force and strength of phrase. But the doctrine was neither new nor recent. The same thing had already been said in Bradley v. Burwell without at all modifying the view expressed as to the liabilities of the sureties between themselves. The argument, from general expressions, wrested from their aim and purpose, detached from their setting, is often plausible, but rarely useful or effective. We have often held, as between the creditor and the estate of a deceased surety, that the joint obligation of the latter ended with his death. We are not yet prepared to decide that his several obligations, originating at the date of the common signature, to contribute ratably to the payments compelled from his associates, also terminates at his death. In Norton v. Coons (3 Den. 130) the sureties were all living, and the precise question did not arise, but it was again held that, while contribution between sureties was founded on a general principle of equity and justice, yet what had been an equitable had become a legal right, and that in such case the law will, for all the purposes of a remedy, imply a promise of payment. In the case of Tobias v. Rogers (13 N. Y. 66) the surety was held not liable to contribute because relieved in his life-time from all liability, either as obligor or co-surety, by a discharge in bankruptcy. It was there said that the defendants in the replevin suit could have released one of the sureties with the assent of the other, and that to the act of the legislature, providing for a discharge in bankruptcy, such other surety in common with every other citizen, is presumed to have assented. The reasoning has no application to the case of a deceased surety. And while the court added that contribution was not founded upon contract, it was further said that the law following equity will imply a promise to contribute in order to afford a remedy. The justice of such a rule is apparent. Originating in equity, it has been grafted upon the law with the aid of an implied promise to secure the legal remedy. We see no reason to reverse it, but every consideration of equity and justice leads us rather to maintain and enforce it. The decision of the court below was, therefore, right.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JORDAN v. DOBBINS. 1877.

122 Mass. 168; 23 Am. Rep. 305.

Contract upon the following guaranty: "For value received, the receipt whereof is hereby acknowledged, the undersigned does hereby guaranty to Jordan, Marsh & Co. the prompt payment by George E. Moore to Jordan, Marsh & Co., at maturity, of all sums of money and debts which he may hereafter owe Jordan, Marsh & Co. for merchandise, which they may from time to time sell to him, whether such debts be on book account, by note, draft or otherwise, and also any and all renewals of any such debt. The undersigned shall not be compelled to pay on this guaranty a sum exceeding $1,000, but this guaranty shall be a continuing guaranty, and apply to and be available to said Jordan, Marsh & Co., for all sales of merchandise they may make to said George E. Moore until written notice shall have been given by the undersigned to said Jordan, Marsh & Co. and received by them, that it shall not apply to future purchases. Notice of the acceptance of this guaranty and of sales under the same, and demand upon said George E. Moore for payment, and notice to me of non-payment, is hereby waived. In witness whereof, I, the undersigned, have hereunto set my hand and seal this twenty-eighth day of February, A. D. 1873. William Dobbins. (Seal.)" Annexed to the declaration was an account of goods sold to Moore.

The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court, on appeal, on an agreed statement of facts in substance as follows:

The plaintiffs are partners under the firm name of Jordan, Marsh & Co., and the defendant is the duly appointed administratrix of the estate of William Dobbins.

William Dobbins, on February 28, 1873, executed and delivered to the plaintiffs the above written contract of guaranty. The plaintiffs thereafter, relying on this contract, sold to said Moore the goods mentioned in the account annexed to the declaration, at the times and for the prices given in said account, all of the goods having been sold and delivered to Moore between January 16 and May 28, 1874. All the amounts claimed were due from Moore, and payment was duly demanded of him and of the defendant before the date of the writ. Other goods

had been sold by the plaintiffs to Moore between the date of the guaranty and the first date mentioned in the account, but these had been paid for.

William Dobbins died on August 6, 1873, and the defendant was appointed administratrix of his estate on September 2, 1873. The plaintiffs had no notice of his death until after the last of the goods mentioned in the account had been sold to Moore.

If upon these facts the defendant was liable, judgment was to be entered for the plaintiffs for the amount claimed; otherwise, judgment for the defendant.

Morton, J. An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until it is acted upon, it imposes no obligation and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them.

The agreement which the guarantor makes with the person receiving the guaranty is not that I now become liable to you for anything, but that if you sell goods to a third person, I will then become liable to pay for them if such third person does not. It is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which cannot be rescinded except by mutual consent. Thus such a guaranty is revocable by the guarantor at any time before it is acted upon.

In Offord v. Davies, 12 C. B. (N. S.) 748, the guaranty was of the due payment for the space of twelve months of bills to be discounted, and the court held that the guarantor might revoke it at any time within the twelve months, and that the plaintiff could not recover for bills discounted after such revocation. The ground of the decision was that the defendant's promise by itself created no obligation, but was in the nature of a proposal which might be revoked at any time before it was acted on.

Such being the nature of a guaranty, we are of opinion that the death of the guarantor operates as a revocation of it, and that the person holding it cannot recover against his executor or administrator for goods sold after the death. Death terminates the power of the deceased to act, and revokes any author-

ity or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke.

Applying these principles to the case at bar, it follows that the defendant is entitled to judgment. The guaranty is carefully drawn, but it is in its nature nothing more than a simple guaranty for a proposed sale of goods. The provision, that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases, affects the mode in which the guarantor might exercise his right to revoke it, but it cannot prevent its revocation by his death. The fact that the instrument is under seal cannot change its nature or construction. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterwards.

We are not impressed by the plaintiffs' argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain whether a person upon whose credit they are selling is living.

The decision in Bradbury v. Morgan, 1 H. & C. 249, upon which the plaintiffs rely, was rested upon reasoning which appears to us to be unsatisfactory and inconsistent with the opinion of the same court a year before, in Westhead v. Sproson, 6 H. & N. 728, and with the decision in Offord v. Davies, *ubi supra*, at the argument of which Bradbury v. Morgan was cited; and it has not since been treated as settling the law of England. Harriss v. Fawcett, L. R. 15 Eq. 311, and L. R. 8 Ch. 866. The reasons of the similar decision in Bank of South Carolina v. Knotts, 10 Rich. 543, are open to the same objections.

Judgment for the defendant.

GAY v. WARD. 1895.

67 Conn. 147; 34 Atl. Rep. 1025; 32 L. R. A. 818.

The facts are stated in the opinion.

WHEELER, J., delivered the opinion of the court:

This case comes before us for our advice on a reservation upon an agreed statement of facts, and with a stipulation, entered into by all the parties to the record, that all questions arising upon the pleadings or upon the agreed facts may be finally determined by this court.

On January 8, 1872, the stockholders of the Delaney & Munson Manufacturing Company, located at Farmington, Conn., executed and delivered to the National Exchange Bank of Hartford a contract of continuing guaranty in the form of a bond, the terms of which appear at length in the opinion of this court in the case of National Exch. Bank v. Gay, 57 Conn. 224, 231, 4 L. R. A. 343, brought against one of the guarantors upon the bond. This bond guaranteed to the bank "the full, prompt, and ultimate payment" of all commercial paper which the bank may "have discounted or may hereafter discount, ... to an amount not to exceed $15,000 in all at any one time." It provided that, upon notice to the bank by one or all of the guarantors upon such instrument, such guarantor or guarantors should not be holden upon said bond for any liability created by such company subsequent to the giving of such notice. From the date of the bond, to February 9, 1888, the bank discounted commercial paper of said company, upon which date the company failed. On January 21, 1889, the bank recovered judgment against the executors of Gay, one of the guarantors upon the bond, for the sum of over $11,000, which sum, together with the expenses of the suit, the executors paid. Subsequently, Wadsworth, another guarantor upon the bond, voluntarily paid to the executors of Gay one half of said amounts. The present action is brought by the executors of Gay and of Wadsworth, against the administratrix of Augustus Ward, a guarantor upon the bond; William Potts administrator upon the estate of Samuel S. Cowles, a guarantor upon the bond; Horace Cowles, a son of said Samuel S. Cowles; and Mary C. Hardy, a purchaser from a distributee of the estate of Horace Cowles. Said Ward died April 6, 1883. His estate was duly settled, and distribution

made December 8, 1883. Said Samuel S. Cowles died in 1873. His estate was duly settled and distribution made June 7, 1873; a part being distributed to his son, Horace Cowles, who died in 1876. His estate was duly settled and distribution made September 25, 1876. A part of the estate inherited by Horace Cowles from his father, Samuel S. Cowles, was purchased by Mary C. Hardy from a distributee of the estate of Horace Cowles, and owned by her when she was made a party to this action. All of the discounts existing February 9, 1888, which the estate of Gay and Wadsworth paid, were made by the bank long subsequent to the death of Samuel S. Cowles, and none were renewals of discounts made in his lifetime. $5,000 of said $11,000 were discounts made by the bank after having notice of Ward's death, and $6.000 of said $11,000 were renewals of paper made after notice of Ward's death, but of paper originally discounted prior to Ward's death. The bank, Gay, and Wadsworth had immediate notice of the death of said Samuel S. Cowles and of Ward. The said manufacturing company was solvent at the time of the death of said Samuel S. Cowles and of Ward.

The stockholders of the Delaney & Munson Manufacturing Company, by pledging their individual credit to the National Exchange Bank, secured funds, through discounts made by the bank, with which to conduct its business. "To avoid the inconvenience of indorsements by several individuals upon each of a large number of original notes and the renewals thereof, the obligors made one comprehensive continuing contract of indorsement in the form of a guaranty under their respective hands and seals." National Exch. Bank v. Gay, *supra.* The bond constituted a contract of continuing guaranty, upon the part of its obligors or guarantors, of payment of all paper discounted by the bank up to the limit of the amount named in the bond. No consideration passed at the execution of the bond. Each discount, when made upon the credit of the guaranty, constituted a consideration, separable and divisible. No obligation arose and no liability was created until a discount was made upon the credit of the guaranty. The bond was framed to meet the contingency of the long continuation of discounts by the bank, and the extension and renewal of discounts made upon the security of its guaranty. Upon the nature of this guaranty this court expressed itself, in the case we quoted from above, as follows:

"To guarantee 'full and prompt' payment would meet the case of a note, on usual bank time, actually to be paid in full at maturity. To guarantee, in addition to 'full and prompt' payment, the 'ultimate' payment, can have no other meaning than that the obligor should continue bound to the end of all substitutions, renewals, and extensions."

The bank was under no compulsion to discount the company's paper. It might, at its option, refuse to continue discounting it. When it made the discounts, the guaranty of the bond attached. Each guarantor upon the bond might, upon notice in writing to the bank, terminate all liability thereafter arising under the bond. Unless the terms of the guaranty forbid, the law writes in the contract of continuing guaranty a like power to revoke the guaranty upon notice. Coulthart v. Clementson, L. R. 5 Q. B. Div. 42; Jordan v. Dobbins 122 Mass. 168; 23 Am. Rep. 305; Agawam Bank v. Strever 18 N. Y. 502. The effect of the death of a guarantor upon a continuing guaranty has been determined differently in different jurisdictions. In Massachusetts, death is held to work a revocation of the guaranty. The court, in construing a continuing guaranty of the sale of goods, in the case of Jordan v. Dobbins, *supra,* said: "Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke. See also Hyland v. Habich, 150 Mass. 112; 6 L. R. A 382. In England, death does not work a revocation of the continuing guaranty. The case of Coulthart v. Clementson, *supra,* was an action brought by a bank upon a continuing guaranty against the executor of a deceased guarantor. The court said: "A guaranty like the present is not a mere mandate or authority revoked *ipso facto* by the death of the guarantor." These two cases illustrate the two views held by courts of different jurisdictions. We prefer to adopt the latter view. To adopt the Massachusetts doctrine would impose upon the guarantee the burden of knowing at all times whether or not the guarantors are in life. There could be no safety in relying upon the credit of the guarantor, unless at the moment of reliance the guarantee knew the guarantor to be in life. The practical dif-

ficulties in the way of a guaranty so construed would prevent credit being given upon it, and curtail a useful method of commercial business. Further, a guaranty of this nature is intended to continue until revoked by act of the parties or its equivalent. But, when the guarantee has knowledge of the death of the guarantor, such knowledge works a revocation of the guaranty. The guarantee no longer relies upon the credit of the deceased guarantor. Each advance made by the guarantee constitutes a fresh consideration, and, when made, an irrevocable promise or guaranty on the part of the living guarantors. Each advance thereafter made is upon the credit of the living not of the dead guarantor. Were this not so,—unless it be held that the representatives of the deceased may upon notice terminate the guaranty,—the guaranty, terminable at the option of the guarantor during life, becomes upon his death, never ending. The limitation which the law gives the living is denied the dead. Estates must remain unsettled, devises of property be withheld, so long as the guaranty may last, and the representatives of the deceased guarantor be powerless to save his estate from a loss which neither he nor they authorized or received benefit for. Such a result justifies and impels a court in reading into the guaranty a limitation of termination of the guaranty, upon notice of the death of the guarantor, as well as upon notice from the living guarantor. Any notice of death which brings that fact within the knowledge of the guarantee is a proper and sufficient notice. In the case of Coulthart v. Clementson, *supra*, the court said: "It is now established by authority that such continuing guaranties can be withdrawn on notice during the lifetime of the guarantor, and a limitation to that effect must be read, so to speak, into the contract. But what is to happen on his death? Is the guaranty irrevocable and to go on forever? It would be absurd to refuse to read into the lines of the contract in order to protect the dead man's estate, a limitation which is read into it to protect him while he is alive. . . . But if the executor has no option of the sort, then, in my opinion, the notice of the death of the testator and of the existence of a will, is constructive notice of the determination as to future advances of the guarantee. The bank from that moment are aware that the person who could during his lifetime have discontinued the guaranty by notice cannot any longer be a giver of notices; that his estate has passed to others, who have trusts to fulfil, and it

is easy for them to ascertain what those trusts are. If these trusts do not enable the executor to continue the guaranty, then the bank has constructive notice that the guaranty is withdrawn." National Eagle Bank v. Hunt, 16 R. I. 148; Harriss v. Fawcett, L. R. 15 Eq. 311. The authorities uniformly hold either that death, *ipso facto,* or notice of death, revokes a continuing guaranty. The fact that the instrument is under seal cannot change its nature or construction. Jordan v. Dobbins, 122 Mass. 168, 23 Am. Rep. 305; Offord v. Davies, 12 C. B. N. S. 748. A similar doctrine holds that notice of the dissolution of a co-partnership revokes a continuing guaranty made by the co-partnership. City Nat. Bank v. Phelps 86 N. Y. 484.

The application of these principles to the case in hand is this: All of the discounts for which recovery was had against Gay's estate, and payment made by Gay's executors and Wadsworth, were made after notice of the death of Samuel S. Cowles. His representatives are therefore freed from all liability for such discounts. Liability, if any, for discounts so made upon the credit of the guaranty, could only accrue against the estate of Samuel S. Cowles, and could in no view of the case be maintained against the estate of Horace Cowles or Mary Hardy. Five thousand dollars of the said discounts were made after notice of the death of Augustus Ward. His representatives are therefore freed from all liability for such discounts. The remaining discounts ($6,000) were originally made before the death of Augustus Ward. His death, with notice, did not relieve his estate from liability for such discounts. For all discounts made prior to his death, whether original discounts or renewals or extensions thereof, his estate is liable upon his death. The duty of the bank upon this bond, if it desired to hold the estate of Ward liable, was to enforce its claim upon the paper existent at Ward's death, against his estate. Instead of this, the bank renewed and extended its discounts taking new paper for the old, without the knowledge or acquiescence of the representatives of Ward. Thereafter the bank must look to the remaining guarantors upon the bond. It waived its right to enforce payment from the estate of Ward when it accepted paper in renewal of the old. Each renewal so made had, for its security, the guaranty of the living guarantors upon the bond, who had not notified the bank of the termination of their liability upon the guaranty.

The conclusion arrived at is just to the bank, for it can cease,

upon notice of the death of a guarantor, to renew paper then discounted, and can enforce its payment against the estate of the deceased guarantor. It is just to the remaining guarantors, who can, upon notice of the death of a guarantor, terminate their liability, and, if compelled to pay that liability, by appropriate remedy compel the estate of the deceased guarantor to contribute his proportion to the liability incurred. For all liability arising before notice of the death of the guarantor, the remaining guarantors, can provide by the terms of the guaranty. In the case at hand all the guarantors upon this bond had notice of the death of both Samuel S. Cowles and Augustus Ward, and made no attempt to terminate their liability upon the bond, and no effort to compel the estate of either to help meet the liability existing, but thereafter, without the knowledge, consent, or acquiescence of the representatives of Cowles or Ward, renewed the old paper through a long series of years, and increased their own liability by fresh discounts. A renewal of paper made before the death of a guarantor, upon the credit of a bond guaranteeing payment of such paper, made after notice of said death to the guarantee, terminates the liability of such guarantor after said notice. The precise question at issue was determined in accordance with the conclusions we reach, in the case of National Eagle Bank v. Hunt, 16 R. I. 148, 153. In its opinion, the court said: "The guarantees in the case at bar come within the second class above considered. They were therefore, upon the authorities cited, terminated by the death of the guarantor, and notice of it to the plaintiff, as to all subsequent transactions. As, however, the note described in the declaration had been discounted, and the net proceeds had been paid to the maker prior to the death of the guarantor, the plaintiff would have been entitled to recover but for the fact, set up in the pleas, that, after notice of the death of the guarantor, it extended the time of payment for a further period, by taking a new note from the principal debtor, and receiving the interest thereon in advance, without the consent of the defendant, and without any reservation of his right, assented to by the principal, to insist upon immediate payment by the principal, and, in default of such payment, to pay the debt himself, and proceed at once against the principal. That such action on the part of the plaintiff was sufficient to release the estate of the guarantor, and the defend-

ant, as his representative, from liability, is too well established to need the citation of authority."

The question whether a guaranty will be revoked by notice of death, when, by the terms of the guaranty, the guarantor could not in life have revoked the guaranty, is not before us, and we express no opinion upon this point.

The claim that, because the bond of guaranty in this case bound the guarantors to the "full, prompt, and ultimate payment" of all paper discounted after the execution of such bond, therefore the guaranty covers discounts made before the death, and the renewals of such discounts made after the death of the guarantor, cannot be sustained. The guaranty here applies to paper discounted, and to the renewal or extension of such discounts, before the decease of a guarantor; otherwise, a continuing liability existed against the estate of the deceased guarantor so long as the renewals were made. Such a result was not intended by the parties to the bond. They did not intend to continue a liability after the death of a guarantor, for an indefinite period, which he and they could terminate at any time during his life. A contract of guaranty is to be construed so as to promote the use and convenience of commercial intercourse. Davis v. Wells, F. & Co. 104 U. S. 159, 169, 26 L. ed. 686, 690. And its language is not to be extended by any strained construction, for the purpose of enlarging the guarantor's liability (Hall v. Rand, 8 Conn. 560 573); but its construction is to be according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety (Lee v. Dick, 35 U. S. 10 Pet. 482, 493, 9 L. ed. 503, 507; Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273, 281, 45 Am. Rep. 204). These established rules of construction accord with the construction we give to the guaranty before us.

We deem it unnecessary to discuss other questions argued before us, since the questions considered are decisive of the case. We have not overlooked the fact that there has been a misjoinder of parties defendant. The estate of Horace Cowles and Mary Hardy were strangers to the guaranty. The representatives of Samuel S. Cowles are alone liable upon his obligations. There is, as well, a misjoinder of parties plaintiff. Mr. Wadsworth voluntarily paid one half of the amount recovered against the estate of Gay. He cannot now maintain, with Gay's representatives,

an action to compel payment to them of the share of other guarantors paid by him for them.

The Superior Court is advised to render judgment in favor of the defendants.

The other Judges concur.

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c. Liability on a bond for faithful performance of duty is not terminated by death of surety.

THE ROYAL INSURANCE COMPANY v. DAVIES. 1875.

40 Iowa, 469; 20 Am. Rep. 561.

The plaintiff's petition states that on or about January 26th, 1872, W. F. Kidder, as principal, and John L. Davies, as surety, executed and delivered to the plaintiff their bond as follows:

"Know all men by these presents, that I, William F. Kidder, of the town of Davenport, County of Scott, State of Iowa, as principal, and John L. Davies, of the town of Davenport, County of Scott, State of Iowa, as surety, are held and firmly bound unto the Royal Insurance Company of Liverpool, a corporation authorized by act of Parliament, and located at Liverpool, England, in the sum of one thousand dollars to be paid unto the company, their certain attorneys or assigns, to which payment well and truly to be made, we jointly and severally, bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and subscribed at Davenport, Iowa, this 26th day of January, 1872.

The conditions of this obligation is such, that whereas the above named W. F. Kidder has been appointed by the aforesaid company their agent for the City of Davenport, County of Scott, and State of Iowa, during the pleasure of the manager and attorney thereof, by reason whereof, and as such agent he will receive into his hands and possession divers sums of money, policies, chattels and other effects, the property of said company, and is bound to keep true and accurate accounts of said property and of receipts and disbursements and to deliver, account for, and pay over the same when demanded and directed according to the instructions of the directors of said company.

Now, therefore, if the said W. F. Kidder shall promptly pay to the said company the amounts received from time to time, and

shall well and truly perform all and singular the duties as agent of said company, as directed, according to the provisions of the charter, by-laws, rules and regulations of said company now existing, or which may be adopted by said company, for and during the time he officiates as said agent, and shall deliver all the property which he may receive and hold as said agent, to his successor in office, or to such other person as the said company, or its authorized officers may direct, then this obligation shall be null and void, otherwise remain in full force and virtue.

(Signed.) W. E. KIDDER, (Seal.)
JOHN L. DAVIES, (Seal.)

Signed, sealed and delivered in presence of H. Goodrich."

It is further alleged that Kidder was duly appointed agent of plaintiff January 26th, 1872, and continued to act until his death, December 19th, 1872; that at the time of his death he was indebted to the plaintiff in the sum of $219.58, for premiums collected by him in October, 1872, and that plaintiff has expended $11.50 in an effort to collect said sum from the estate of said Kidder.

The defendant answered admitting substantially the allegations of the petition, and alleging as an affirmative defense thereto, that John L. Davies, the surety died on the 23d day of April, 1872; that thereby his estate was discharged from any further liability on said bond, and that up to the time of his decease the conditions of said bond had not been broken, but that the breaches thereof alleged in the petition, happened after the death of said Davies.

To this answer the plaintiff demurred, which being overruled and plaintiff standing thereon, judgment was rendered for defendant. Plaintiff appeals.

MILLER, Ch. J. The question presented in the record is whether the death of Davies, the surety in the bond, operated in law as a discharge of his estate from liability for the default of the principal, happening after the death of the surety. In other words, whether the death of the surety operated to terminate the obligation assumed by him when he executed the bond on his part. It is not claimed on the part of the defendant that the liability of the surety, or his obligation as such, was terminated by reason of any act, or omission of the plaintiff, but it is claimed that the obligation of the surety ceased and the bond became defunct, as to every act done after the death of the surety

by reason of such death alone. By the terms of the bond the surety, Davies, bound himself, his "heirs, executors and administrators," as surety for his principal, Kidder. This language shows no intention to limit the liability to the lifetime of the surety; on the contrary it imports that the liability shall continue after his death, and bind his heirs and personal representatives. This intention is further manifested by the subsequent language of the bond, in defining more particularly the obligation assumed by the obligors therein. It is, that, "if the said W. F. Kidder shall promptly pay to the said company the amounts received from time to time, and shall well and truly perform all, and singular the duties as agent of said company, as directed, according to the provisions of the charter, by-laws, rules and regulations of said company now existing, or which may be adopted by said company, for and during the time he officiated as said agent, then this obligation shall be null and void, otherwise remain in full force and virtue." This language clearly shows that the obligation of the sureties to the bond was to continue for and during the time Kidder, the principal, should officiate as agent of the company. Of course the death of Kidder would terminate the obligation of the sureties, for thereby the agency of Kidder would terminate. The terms of the bond continue the liability of the sureties as long as Kidder should act as agent of the company and this liability likewise by the terms of the bond, extends to the heirs and legal representatives of the sureties. They are bound by as clear and unmistakable language as that which binds the sureties personally. Instead of there being any intent manifested to limit the obligation of the sureties to the terms of their respective lives, it is clearly shown that it was intended the obligation should extend to, and bind the heirs and personal representatives of the sureties, and that the binding force of the bond, and the sureties' liability should continue as long as Kidder should act as the agent of the company.

No case exactly in point has been cited by appellant, and no authority whatever is cited by appellee. We are clear, however, that upon the general principles regulating contract, and the terms of the bond in this case the death of the surety, Davies, did not terminate the binding force of the bond upon his heirs and legal representatives for the failure of Kidder, while he was agent of the plaintiff, to pay over money coming into his hands

as such agent. The case of Gordon v. Calvert, 4 Russ. 581, cited by appellant supports the view we have here taken.

The court erred in overruling the plaintiff's demurrer to the answer.

Reversed.

ESTATE OF RAPP v. PHOENIX INS. CO. 1885.

113 Ill. 390; 55 Am. Rep. 427.

Action on a bond. The opinion states the case. The plaintiff had judgment below.

MULKEY, J. It is contended by appellant that the bond in question is in legal effect the same as a guaranty of future advances to the extent of $1,000; that it did not become binding or operative upon the makers until money or other property belonging to the company came into the hands of J. B. Booker & Co. as its agents; that money or property thus coming into their hands is to be regarded in the nature of future advances, and to be governed by the same rules of law that are applicable to such advances; that the contract being indefinite as to its duration, either party had the right to terminate it on notice; that it existed, so to speak, by the continued desire or joint will of the parties, and as this, in the nature of things could not extend beyond their joint lives, and as Rapp could not, after his decease, terminate the contract by notice, the law itself terminated it, and hence Rapp's estate is not bound for any thing that occurred after his death. Such is the position of appellant, as we understand it.

The bond in question is something more than an ordinary contract of guaranty. It is a joint and several contract between Joseph H. Booker, Albert H. Brace and M. Rapp, on the one side, and appellee on the other. The contract discloses upon its face that Booker and Brace, under the style of J. B. Booker & Co., has been appointed agents of appellee in conducting the insurance business, and that by virtue of their appointment, and the service upon which they had or were then about to enter, certain moneys, chattels and effects would come into their hands, which of itself disclosed a sufficient consideration to support the

undertaking of the obligors so long as the agency continued. The contract therefore became binding immediately upon the execution of the instrument, and had a default on the part of the agents occurred in the lifetime of Rapp, there is no question but that a joint action might have been maintained on the bond against all three of the obligors. The instrument then was a written contract, whereby the obligors, jointly and severally, bound themselves, their executors and administrators, to the extent of $1,000, for the faithful discharge of the duties of two of them in a certain specified business of a confidential character. Two of the obligors stipulate for their own honesty and business fidelity; the other joins in the stipulation, and also individually guarantees the same thing. It is to be observed that unlike an ordinary continuing guaranty, as it is claimed this is, nothing is to be done by any of the parties to the instrument to give it effect or make it binding upon them, as is always the case where the payment of future advances merely is guaranteed. The difference between the two cases is well illustrated by the language of the court in Jordan v. Dobbins, 122 Mass. 168; s. c. 23 Am. Rep. 305, cited and relied on in appellant's brief. In that case the goods sued for were sold after the guarantor's death, and the court in holding there could be no recovery, among other things said: "An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until acted upon it imposes no obligation, and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them. It is in the nature of an authority to sell goods upon the credit of the guarantor, rather than a contract which cannot be rescinded except by mutual consent. Thus such a guaranty is revocable by the guarantor at any time before it is acted upon. Such being the nature of the guaranty, we are of opinion that the death of the guarantor operates as a revocation of it, and that the person holding it cannot recover against his executor for goods sold after the death."

Without expressing any opinion for the present in respect to the conclusion reached in that case, we fully concur in the general expressions of the court with regard to the peculiar character of a continuing guaranty where it is supported by no considera-

tion other than advances to be made at a future day, and where the party to whom the guaranty is given assumes no obligation to make such advances, as is generally the case with such guaranties. But the transaction now under consideration can hardly be said to be a guaranty of this character. Taking a common-sense business view of the matter, the giving of the bond and its acceptance by the company were the final acts by which Booker & Brace were clothed with authority to open an insurance office at Jacksonville in the name and on behalf of the company. And there can be no doubt but that the intrusting them with its business, and permitting them to conduct it with the public in the company's name, was a sufficient consideration, independent of the fact the instrument was under seal, to support the agreement in question. In these respects the Dobbins case is wholly unlike the one in hand. In this case no additional act was to be done by appellee, or any one else, to give the bond effect. Business was commenced and continued under it for a long time satisfactorily to all parties. Even according to the rule applicable to continuing guaranties, strictly so-called, the bond under consideration was in full force and effect long before Rapp's death. We have looked with considerable care to see if the general principles applicable to a continuing guaranty of the kind mentioned have ever been extended to an ordinary agent's bond, as is sought to be done here, and we have wholly failed to find any authority for it, and certainly none has been cited.

Considerable space in appellant's brief is occupied in an effort to show that Rapp's liability upon the bond could have been terminated at any time before his death by his giving the company notice to that effect. Whether his liability could have been thus terminated in his life-time, or whether his executors might in this manner have terminated it after his decease, are questions which do not directly arise on this record, as it is not pretended any such notice was given, either before or after his death. But as these questions probably have more or less bearing upon the main question in the case, presently to be stated, they may be incidentally noticed further on.

The controlling question in the case is, whether upon Rapp's death the bond in question, by the operation of law, ceased to have any legal effect as to subsequent transactions between the company and its agents, J. B. Booker & Co. It is a familiar rule

of law that requires no citation of authority for its support, that the death of the principal is *per se* a revocation of the agent's authority, and hence all contracts or other engagements subsequently entered into by the latter, on behalf of the principal, are absolutely void as to his legal representatives, and this notwithstanding the death of the principal was unknown at the time such contracts or other engagements were entered into. On the other hand, the general rule unquestionably is that all contracts entered into by one, not of a personal character, are equally binding upon himself and his legal representatives after his decease. This general rule is well stated in Chitty on Contracts (10th Am. ed.), page 101. The author says: "It is a presumption that the parties to a contract bind not only themselves, but their personal representatives. Executors therefore are held to be liable on all contracts of the testator which are broken in his life-time, and with the exception of contracts in which personal skill or taste is required, on all such contracts broken after his death; and such parties may likewise sue on a contract, although they be not named therein." In the present case however Rapp, as we have already seen, expressly binds his executors and administrators, and hence no question of presumption of liability can arise, so far as Rapp's legal representatives are concerned, for if it be possible to bind them by any terms, they are certainly bound.

Appellant contends, however, as the bond is nothing more than an ordinary continuing guaranty, without limitation as to time, and could not for that reason have extended in any event beyond the guarantor's life, the provision expressly binding his personal representatives must have been intended to apply only to such defaults as might occur during his life-time. For reasons already appearing, and others hereafter to be stated, we do not think this view is sound. In support of the proposition that the bond in question ceased to have any legal effect or binding force upon the death of Rapp, as to all subsequent transaction, four cases are cited and relied on, namely, Pratt v. Trustees, etc., 93 Ill. 475; Jeudevine v. Rose, 36 Mich. 54; Harris v. Fawcett L. R. 15 Eq. Cas. 311, and Jordan v. Dobbins, already referred to.

The principle applied to the Pratt case, and upon which it was decided, is the well-recognized doctrine that a mere voluntary proposition may be withdrawn at any time before such

action is taken under it as will in law show not only its acceptance, but also a sufficient consideration to sustain it as a contract. In every case of a mere voluntary proposition, if the party making it die before any action has been taken under it, his death will in law operate as a withdrawal of the proposition, consequently it cannot be accepted or acted upon afterward so as to bind his estate. The principle here stated, and which was applied to the Pratt case, we do not think has any application to this one.

Jeudevine v. Rose, *supra,* in some of its features is much like the case before us. In that, as in this, the action was upon a bond, which like the present case, was founded upon a sufficient present consideration, and related to a contemporaneous contract of indefinite duration, which was subject to be abrogated by either of the parties to it and of course upon such abrogation the bond itself would have become *functus officio.* Here the resemblance between the two cases ceases. The bond in that case was a guaranty of future sales; in this case it is a guaranty of the honesty and fidelity of particular persons in a specified business. In that the money sought to be recovered was the price of goods sold after the obligee in the bond had been expressly notified not to make any further sales on the faith of the defendant's guaranty. In this case, neither Rapp, in his life-time, nor his executors, after his decease, gave any such notice. It will be thus seen the two cases differ materially in a number of importance particulars, so that there is no ground for the claim that that case controls this. The actual point decided in the Michigan case is, that the surety (the obligor in the bond) had the right to terminate his liability upon it by giving notice, as he did. This certainly falls far short of sustaining the position that a liability of that character is determined by death, without such notice.

Harris v. Fawcett, *supra,* was a chancery proceeding. The guaranty in that case was one of future advances, wherein it was expressly provided the guaranty should continue for six months, notice in writing, under the hand of the guarantor, "to discontinue the same." The guarantor died, leaving as his executor the debtor on whose account the guaranty had been given. It was known to the creditor having the guaranty, there was no personal estate to discharge the liability of the deceased upon the guaranty, nevertheless they continued to make advances to the

executor, on the faith of it, after the guarantor's death. This was such a transaction between the creditors and the executor, who was acting in manifest disregard of his duty to the estate, with their knowledge, that no court of equity ought to have sustained it, and so it was held. In that case, as we have just seen, the right to terminate the contract by six months' notice was expressly reserved in the contract itself. But as the death of the guarantor rendered it impossible to give the kind of a notice provided for, namely, a notice under the guarantor's own hand—a fact to which the court seems to have attached considerable importance—it was held, as the contract was clearly not intended to continue forever, the estate of the guarantor, under the circumstances, was not bound for advances made after his death. The case however is not an authority for the proposition that the death of a guarantor in a case like the present is *per se* an abrogation of the contract. On the contrary, the logic of the entire reasoning of the court leads irresistibly to the opposite result. In the present case there is no provision in the contract of the obligors by which they are authorized to terminate their liability on the bond, and the duration of their liability is therein expressly declared to be during the time J. B. Booker & Co. officiated as agents of the insurance company, so it is clear the contract in this case is essentially different from the one in that, but the reasoning in that case as just observed, is clearly against the appellant in this.

In the case of Jordan v. Dobbins, *supra,* the action was brought on a continuing guaranty to recover the price of goods sold after the guarantor's death, and it was held there could be no recovery, on the ground that the guarantor's death terminated the guaranty, notwithstanding it was unknown at the time the goods were sold. In thus holding, the case is clearly unsupported by the decided weight of authority. Chitty Cont., *supra;* Brandt Suretyship 113; Green v. Young, 8 Greenl. 14; s. c., 22 Am. Dec. 218; Moore v. Wallis, 18 Ala. 458; Royal Ins. Co. v. Davies, 40 Iowa 469; s. c., 20 Am. Rep. 581; Menard v. Scudder, 7 La. Ann. 385; s. c., 56 Am. Dec. 610. If as contended by appellant, there is no difference in principle between that and the present case, it must be admitted the former is an authority directly in point sustaining his position; but as already indicated, we think there is an essential difference between a guaranty of future advances, whether in the form of bond or as is usually the case of a mere

stipulation, and a bond executed by an agent and his sureties for the faithful discharge of the former's duties in some business or employment, as was the case here. Such a bond is in all its essential features like the bond of an executor, guardian, trustee, and the like. The only difference between the two cases is, that most of these bonds are required to be taken by express statutory provision. But this only relates to the duty of giving such a bond. It does not change its scope, character or legal effect when given. All voluntary bonds executed for a lawful purpose, like statutory bonds, derive whatever efficacy or binding force they have, from the positive law of the State, and in this respect there is no difference in the two classes of bonds. To hold that the estate of a surety on an ordinary trustee's bond is absolutely discharged from all future liability upon the death of the surety, on the ground that his death is *per se* an extinguishment of the bond, would certainly be a startling proposition to come from this or any other court of final resort; and yet to decide this case in conformity with appellant's theory would be in legal effect, to assert, as we understand it, that very proposition. We unhesitatingly decline, both upon reason and authority, to give our adhesion to any such doctrine. We have no doubt of the correctness of the ruling of the trial court in allowing appellee's claim to the extent it did.

With respect to the question raised by the assignment of the cross-error, but little need be said.

We are of opinion the court also ruled properly in refusing to allow to appellee the amount of deficit for the month of February—not on the ground however the bond had become *functus officio* but because the company, in retaining in its service J. B. Booker & Co. after notice of the January default, which was just cause for discharging them, violated a duty which it impliedly assumed to Rapp and his legal representative on accepting the bond. When the employer of a clerk or other agent takes from another a bond of indemnity or other instrument, guaranteeing the honesty and fidelity of such clerk or agent while in the service of the employer, the latter impliedly stipulates that he will not knowingly retain such clerk or agent in his service after a breach of the guaranty justifying his discharge, and that in the event he does so without the surety's consent, it is to be at the employer's own risk. This is not only fair dealing and common honesty, but it is a rule of law also. The principle

here announced is well established by the authorities. Phillips v. Foxall, L. R. 7 Q. B. 666; Anderson v. Aston, L. R. 8 Exch. 73.

Holding, as we do, the ruling of the trial court was correct in allowing the claim for the amount it did, it follows the appellate court properly affirmed the order.

DICKEY and CRAIG, J. J., dissented.

Judgment affirmed.

CHAPTER XV.

FIDELITY BONDS.

a. Concealment by the obligee of facts material to the risk will avoid a fidelity bond.

LAUER BREWING CO. v. RILEY. 1900.

195 Pa. St. 499; 46 Atl. Rep. 71.

Appeal from court of common pleas, Luzerne county.

Action by the Lauer Brewing Company against Robert P. Riley and others. There was a non-suit as to certain defendants, which the court refused to take off, and plaintiff appeals. Affirmed.

Per Curiam. The only question raised on this record is the refusal of the court below to take off the compulsory non-suit entered as to the defendants Crossen and Carr. As to them, it appeared by the plaintiff's testimony that, at the time they became sureties on Riley's bond to the plaintiff, Riley, the principal in the bond, was a defaulter, and a debtor, as such, to the plaintiff and that this fact was withheld from the sureties. That this was a good defense against the bond, on the part of the sureties, was ruled by this court in the case of Wayne v. Bank, 52 Pa. St. 343. Such a concealment of such a fact, known to the obligee at the time of taking the bond, as was the fact in this case, is a fraud upon the sureties, and avoids it, as to them. The rulings in Portner v. Kirschner, 169 Pa. St. 472, 32 Atl. 442.

and Bank v. Braden, 145 Pa. St. 473, 22 Atl. 1045, are not upon this point, and they are therefore not applicable.

Judgment affirmed.

End

LIEBERMAN v. FIRST NATIONAL BANK. 1900.

2 Pennwill (Del.) 416; 45 Atl. 901; 82 Am. St. Rep. 414.

Appeal from chancery court.

Bill by Nathan Lieberman against the First National Bank of Wilmington. From a decree dissolving a preliminary injunction, complainant appeals. Affirmed.

Argued before Lore, C. J., and Pennewill, Boyce, and Grub, JJ.

Lore, C. J. Nathan Lieberman, the appellant, one of the sureties of two official bonds of Peter T. E. Smith, late paying teller of the First National Bank of Wilmington, has appealed in this case from the decree of the chancellor made December 3, 1898, which dissolved a preliminary injunction granted by the late Chancellor Wolcott November 6, 1893, restraining the bank from collecting the amount of certain defalcations of Smith, made by him while acting as teller of the said bank. The bonds bore date, respectively, November 1, 1879, and July 6, 1885. Each bond was in the penal sum of $15,000, and set forth that said Smith had been duly elected and chosen teller of the bank during the pleasure of the board of directors, that each was conditioned for the faithful discharge of the duties of his office as teller of the said bank. Annexed to each bond was a joint and several warrant of attorney to enter judgment thereon. During the life of the first bond, between November 1, 1879, and July 6, 1885, Smith fraudulently abstracted funds of the bank to the amount of $11,650. During the life of the second bond, between July 6, 1885, and July 5, 1891, he so abstracted $27,750. These defalcations were fraudulently concealed by false entries made by Smith on the books of the bank. The defalcations were discovered about February 18, 1893, and a full confession was made by Smith. Upon the 24th day of February, 1893, judgment was entered in the superior court of the State of Delaware on each of said bonds; said judgments being No. 299 to February term, 1893, on the bond of November 1, 1879, and No. 301 to the said term on bond of July 6, 1885. On the latter judgment, execu-

tion was issued October 19, 1893, and thereunder the goods and chattels of Lieberman were taken in execution, and were about to be advertised and sold, when further proceedings were restrained by the preliminary injunction of November 6, 1893.

The chief assignments of error relied on and urged in the brief and argument in behalf of the appellant were (1) that the bonds were void as to Lieberman because he was induced to become surety thereon by fraudulent representations of the respondent; (2) that, at the time of the entry of the judgments, action on the bonds was barred by the statute of limitations.

1. The appellant contends that under the evidence in this case there is clear proof that immediately before complainant became surety on the bond of November 1, 1879, he had a conversation with George D. Armstrong, cashier of said bank; that Armstrong, then told him that he would run no risk in becoming surety for Smith, as he was "a good, reliable, honest man, and his accounts are all straight, and as paying teller he cannot take anything," and that he had read the published statements of the bank, showing its then resources and liabilities; that immediately before complainant became surety on the bond of July 6, 1885, he had a further conversation with George D. Armstrong, cashier of the bank; that Armstrong then told him that Smith's books and everything were straight, and that "there was no risk whatever in going on his bond again"; and that he had read the statements of the bank, with its then resources. Complainant avers that he was induced to become surety for Smith because of such statements made to him by the cashier, and by the published reports of the bank, showing its resources and liabilities, immediately before he became surety; that these reports were made, and published pursuant to an act of congress, and the cashier, who made oath thereto, and the directors, who certified to the correctness thereof, did so under the authority conferred upon them, and in discharge of a duty imposed upon them by law; that, from the facts thus proved, the bonds signed by the complainant are void as to him, because he became surety thereon by reason of such fraudulent representations of the respondent. It nowhere appears in the testimony that Armstrong, the cashier, was authorized by the bank in any way to make representations in this matter of surety on Smith's bonds, or that it was in the line of his duty as cashier to do so. Any statements made by him to Lieberman as to Smith's honesty, the condition of his books and

accounts, and the probable risk to his surety, could, therefore, in no wise bind the bank. Lieberman took them at his own risk, as the individual judgments of Armstrong. The supreme court of Kentucky, in Graves v. Bank, 10 Bush. 23, held that published reports of the assets and liabilities of a national bank, under the acts of congress, which were false, but which, under the proof, induced a person to become surety on the official bond of the cashier of the bank, made the bond void as to such surety, and relieved him from liability thereon. The contrary doctrine is maintained in Bank v. Albee, 63 N. H. 152, where, after reviewing the Graves case, the court says: Such "report was not due to persons considering the question of becoming sureties of the treasurer. It was a duty imposed by statute for the benefit of depositors, and not to enable a reader of the public reports to determine whether the treasurer was a man whose official bond he could safely sign." This reason applies with equal force to the case now before us. It is difficult to perceive upon what principle of law or equity such published reports of the bank can be held as an inducement to Lieberman to become surety on Smith's bond. They were not made by the bank for that purpose. Their publication from time to time had no relation to such suretyship, nor did they disclose upon their face whether Smith was honest or dishonest. If Lieberman saw fit to draw from such reports the conclusion that he could safely become surety on Smith's official bond, it was unquestionably his own volition, and without participation of the bank, and for which the bank should not be held responsible. There seems to be, therefore, nothing either in the statements of the cashier, Armstrong, or in the published reports of the bank, that would relieve Lieberman of his liability as surety on the bonds.

2. The main and most important question in this case is raised by the statute of limitations. The statute relating to bonds of this character is as follows: "No action shall be brought upon any bond given to the president, directors and company of any bank, or to any corporation, by any officer of such bank or corporation, with condition for his good behavior or for the faithful discharge of the duties of his station, or touching the execution of his office, against either principal or sureties, after the expiration of two years from the accruing of the cause of such action; and no action shall be brought, and no proceeding shall be had upon any such bond or upon any judgment thereon,

against either principal or sureties, for any cause of action accruing after the expiration of six years from the date of such bond.'' Rev. Laws, p. 889, § 11. No question in this case arises under the last clause of the law, as the evidence shows that all the defalcations occurred within six years from the date of the bond under which they are claimed in each case. We have, therefore, only to deal with the two years' limitation in the first clause. Judgment was entered February 24, 1893. Three items of defalcation under the bond of July 6, 1885, viz.: April 11, 1891, $500; July 2, 1891, $500; July 3, 1891, $1,500; amounting to $2,500,—are within the two years, and would not be affected by the statute in any event. The residue of the defalcations are without the two years. Does the statute of limitations bar recovery, as claimed by the appellant? It was shown in the evidence that Smith had fraudulently abstracted $4,600 of bank funds at the date of the first bond, November 1, 1879; that under that bond he so abstracted $11,650; and under the bond of July 6, 1885, $27,750; that all these peculations were fraudulently concealed by entries and alterations so skillfully made by him on the books of the bank as to escape detection until he made disclosure of the same about February 18, 1893; that during all that time he was a capable and trusted officer of the bank, enjoying the confidence of his employers and of the community. The respondent contends that the bar of the statute is removed by the concealed fraud of Smith.

The question whether the fraudulent concealment of the existence of the cause of action will hinder the operation of the statute of limitations is one which has been much discussed, and upon which there has been a radical difference of opinion. On one side it is said that the statute in plain terms fixes the time when action shall be brought after the cause of action accrues; that the cause of action accrues when the act is done and the fraud is consummated, and from that time, and not from the time the plaintiff discovered it, the statute interposes as a protection; that while courts of equity may make an exception in cases of fraud, because they are not strictly bound by the statute, yet for courts of law to do the same is to except from the law cases which are plainly within its terms. On the other side, it is said that the statute must be expounded reasonably, so as to suppress, and not to extend, the mischiefs it was intended to cure; that it was intended to suppress fraud, by preventing

unjust claims from starting up after a great lapse of time, when evidence by which they might be repelled was forgotten or had ceased to exist; that it should not, therefore, be so construed as to encourage fraud, by enabling those who, through falsehood or deceit, have managed to keep one in ignorance of the fact that he had a cause of action, to take advantage of their own wrongdoing, under a plea of the statute. "We think," says the court in Reynolds v. Hennessy (R. I.), 23 Atl. 639, "the latter position is best sustained by reason and authority. It certainly is in the line of justice and morality. The only objection to it is that it introduces an exception into the statute." The same objection lies, to claims in favor of the government, and to cases of new promise. The statute does not take away the debt, but simply affects the remedy. Hence, if one by fraud conceals the fact of a right of action, it is not ingrafting an exception on the statute to say that he is not protected thereby, but it is simply saying that he never was within the statute, since its protection was never designed for such as he. By fraud he has put himself outside of its pale. Whether this be taken as an exception, or only a limitation of the statute, it rests upon sound reason and just policy. Id.; Bree v. Holbeck, 2 Doug. 655 (Lord Mansfield); South Sea Co. v. Wymensdell, 3 P. Wms. 143. Such a construction has been so frequently applied to the statute, that it is now said to have the weight of authority in its favor. Massachusetts, Maine, New Hampshire, Pennsylvania, Illinois, Indiana, and Texas are among the states supporting this view, while the contrary has been held in New York, Virginia, North Carolina, South Carolina, and New Jersey. In Turnpike Co. v. Field, 3 Mass. 201, Chief Justice Parsons uses this language: "That, where the delay in bringing the suit is owing to the fraud of the defendant, the cause of action ought not to be considered as having accrued until the plaintiff could obtain knowledge that he had a cause of action; and if this knowledge was concealed from him by the defendant fraudulently, the court would violate a sacred rule of law if they permitted the defendant to avail himself of his own fraud." The reason given by Lord Redesdale in Hovenden v. Lord Annesley, 2 Schoales & L. 634, why the statute should not operate as a bar where fraud has been concealed by one party until it has been discovered by the other, is "that the statute ought not, in conscience, to run; the conscience of the party being so affected that he ought not

to avail himself of the length of time." Whatever may be the conflict in court of law upon this point, it is, without controversy, the settled doctrine in courts of equity. Ang. Lim. 183. Coster v. Murray, 5 Johns. Ch. 522.

But it is insisted that, while this rule prevails against the person who committed the fraud, a different rule exists in favor of innocent sureties, who had no knowledge of, and did not participate in, such fraud; that while Smith, who fraudulently concealed his peculations, would not be suffered to shield himself behind the statute, Lieberman, his surety, who is innocent of fraud, has a right to set up the statute as his protection. ✓ In cases like this, is there any such distinction between the liability of principal and surety? In Charles v. Haskins, 14 Iowa 473, which was an action against sheriff's sureties for wrongful seizure of goods under an execution, the court says, "The governing principle is that the liability of the surety is dependent upon that of the principal." In Zent's Ex'r v. Heart, 8 Pa. St. 337, which was an action against a surety on a promissory note barred by the statute, where the principal had paid interest within six years, Chief Justice GIBSON held that "the decisions at length have settled that the payment of one is the acknowledgment of both, whenever it has been made during their joint responsibility,—in other words before it has been severed by the death of one of them." In Boehmer v. Schuykill Co., 46 Pa. St. 452, which was an action against sureties on a county treasurer's bond, where the defense was that the county commissioners had exceeded their power in borrowing the money which came into the treasurer's hands, and that the money so received was not within the bond, the court (Chief Justice WOODWARD) says, "In so far as the principal is liable by the mere force and terms of the bond, the surety is bound with him." In Patterson's Appeal, 48 Pa. St. 342, the sureties of an absconding assignee, who was trustee for the benefit of creditors, were held not entitled to credit on account which their principal could not claim, by reason of fraud. STORY, J., says: "The sureties stand in no better position than their principal. The measure of his responsibility is the measure of theirs." In Bradford v. McCormich, (Iowa) 32 N. W. 94, which was an action against the sureties of a justice of the peace for money collected and fraudulently concealed until the statute had run, the court says: "The statute in this case is pleaded by the sureties, and they

have not been guilty of any fraud; but they, without doubt, we think, are bound by the fraudulent conduct of their principal. The liability of the surety is dependent upon the liability of the principal. The ordinary rule is that, if the principal is bound, so is the surety." This point has been directly adjudged in this state. In Sparks v. Farmers' Bank, 3 Del. Ch. 275,—a case against the sureties of a defaulting cashier of the bank,—the precise question was determined. The chancellor there held that the bank was entitled to collect of the sureties so much of the defalcations as occurred more than two years previous to the entering of the judgment on the bond, for the reason that "their equity to do so arises out of the fact that the defalcation was a fraud concealed from the bank, with respect to which a court of equity will not permit the statutory bar to be set up until the lapse of the prescribed term after the discovery of the fraud." This case was argued by some of the ablest lawyers of the state. While it is true that the distinction between the liability of surety and principal in cases like this, where there is concealed fraud, does not seem to have been raised and dwelt upon by counsel for the sureties, still it is only fair to assume that the failure to do so did not arise from any lack of knowledge or research, but, rather, from lack of material for, and confidence in, such a defense. The case of Grimshaw v. Mayor, etc., 5 Del. Ch. 183, which was against the sureties of a defaulting treasurer of the city of Wilmington, has been urged as countervailing this doctrine. The chancellor, in his opinion, expressly excepts cases like the present out of his consideration, in the following language: "I shall not enter into a general discussion of the principle applicable to a case where a concealed fraud has been proved to exist on the part of the defendant in a suit brought against him after the discovery of the fraud has been made, but not within the period mentioned in the statute in that respect, to make him account for the amount of said fraud, because I am of the opinion that the principles adjudged in cases of that kind, where the statutory limitation has been pleaded as a bar to the cause of action, are not applicable to the case before me. * * * It is true that where one person defrauds another of his just rights, and the fraud is concealed at the time of its commission, and not discovered within the period embraced by the statute of limitations, the party defrauded has a right to bring his action for the recovery of the amount of which he has

been defrauded at any time within the proper legal period for bringing actions." The cases of Hudson v. Bishop (C. C.), 32 Fed. 519, U. S. v. Mark's Sureties, 3 Wall. Jr. 358, Fed. Cas. No. 11,990, and of Pratt v. Northam, 5 Mason 95, Fed. Cas. No. 11,376, relied upon by counsel for the appellant, do not seem to modify this principle relating to sureties.

It therefore seems to be established that, in cases on official bonds, concealed fraud on the part of the principal will deprive both principal and surety of the benefit of the statute of limitations; that the statute does not begin to run until the fraud is discovered. The reason seems to be that in such bonds the sureties guaranty the good conduct and faithfulness of the principal in the discharge of the duties of his office, and that in equity and good conscience, they should not be exempt from liability for his misconduct and peculations because by fraudulent concealment he has prevented discovery until the time limited by the statute to bring action has expired. Any other construction would make the very frauds against which the sureties covenanted the means for relief from liability. The bond in such case, instead of securing the faithfulness of the officer, would tend to promote on his part skillful and fraudulent concealed peculations, and would be an inducement to fraud. If concealed fraud, which the principal undertakes not to perpetrate, deprives such principal of the protection of the statute, is it not equally reasonable that the undertaking of the surety that such fraud should not be perpetrated excludes the surety, also? The principal undertakes not to commit fraud. The surety guaranties that he shall not commit fraud. There would seem to be no substantial reason why their respective liabilities for such fraud should be different. It may seem hard that, by reason of the fraud of a principal, the liability of an innocent surety should be continued for many years after the expiration of the time named in the statute of limitations. The hardship would be greater if another equally innocent person should be made to suffer by such fraud in cases where the surety undertakes that the principal shall be faithful and honest in that very matter. The equities being equal as to innocence, the added burden of his obligation rests upon the surety. "It is true that equity will not relieve against the bar of the statute, in favor of the party who has been in laches in not using means within his power to discover the fraud." Sparks v. President, etc., 3

Del. Ch. 306. It must be remembered that in these bonds Lieberman undertook for the fidelity of Smith absolutely and at all events, and engaged unconditionally to make good his defaults. True it is, he contracted in view of the statute of limitations. It is equally true that he contracted in view of the law contained in adjudged cases in this state controlling the application of the statute. The rule is that: "It is good faith, and not diligence, which is required of the creditor as a condition of his right to hold the surety; but the creditor or obligee in a bond is not obliged, for the benefit of sureties, to watch the principal. It is because it is really impracticable for this to be done effectively and at all times, on the part of large corporations, that official bonds are required. To subject the responsibility of such sureties to so indefinite a question as whether due diligence has been exercised by directors would render these securities worthless." Id. 302. Judge Thompson, in Wayne v. Bank, 52 Pa. St. 349, thus defines the diligence required in the officers of a bank: "I know of no positive duty resting on the officers of the bank to investigate with a view to inform a surety, in the absence of any inquiry or request of him to do so. Had such a request been made, and it had been denied or evaded, a different question might have been presented. Neither the bank nor its officers knew or had reason to suspect, so far as we can learn, the defalcation afterwards discovered." Chief Justice SHAW tersely says in Bank v. Root, 2 Metc. (Mass.) 540, that "negligence of directors and their agents is no excuse." In a case cited by the appellants (Graves v. Bank, 10 Bush. 28) the measure of diligence is thus defined: "The directors may have been negligent in the discharge of their duties, and this negligence may have enabled Mitchell for the time to misappropriate the funds of the bank, and to conceal its true condition by the false reports made to the controller of the currency, and by false entries upon the books of the association; but this negligence cannot avail the sureties, who covenanted that their principal should well and truly perform the duties of his position. Their covenant is unconditional, and no failure of duty on the part of the directors of the association, short of actual fraud or bad faith, can be deemed sufficient to exonerate them from its performance." The testimony in this case discloses no such laches as would discharge the surety. It shows that Smith was generally esteemed as an honest and capable officer; that the usual ex-

aminations of the condition of the bank from time to time were had, both by the officers of the bank and by a government examiner; that no suspicion of the defalcations of Smith existed in the mind of any one at any time prior to February, 1893; that Lieberman made no request for an examination of Smith's accounts; that the defalcations were therefore concealed by Smith, who was a skilled accountant. There is no claim that the bank did not exercise good faith towards the surety at all times.

A careful examination of this case discloses no ground for the relief of the surety. The decree of the chancellor in that respect is therefore affirmed. Inasmuch, however, as it appears from the entire record that certain errors have been inadvertently incorporated into the decree of the chancellor in respect to the date of the first bond, the duration of the defalcation under the second bond, and the allowance of interest on the penal sum of each bond, it is the judgment of this court that said surety is liable for the defalcations of said Smith, with interest from the date of each defalcation to the 3d day of December, 1898, the date of the decree of the chancellor in this case, provided the aggregate sum of the principal and interest ascertained to said date on each bond shall not exceed the penalty thereof; and the said surety is also further liable for interest on such aggregate sum so ascertained from the said 3d day of December, 1898, the date of said decree. And now, to wit, this the 19th day of January, 1900, it appearing to the court that on the 3d day of December, 1898, it was ascertained by the decree of the chancellor in this case that there was due on each of the said bonds a sum in excess of $15,000, the penalty thereof: Now, therefore, it is ordered, adjudged, and decreed that the said the First National Bank of Wilmington, the respondent, have liberty to collect on each of its judgments entered on each of the said bonds in the superior court of the state of Delaware, in and for Newcastle county, against Nathan Lieberman, the appellant, the sum of $15,000 with interest thereon from the 3d day of December, 1898, the date of the said decree, and the date of the authoritative and legal ascertainment of the amount due on each of the said bonds. And it is further ordered that the appellant pay the costs in this case within three months, or attachment issue.

GOLDMAN v. FIDELITY AND DEPOSIT CO. 1905.

125 Wis. 390; 104 N. W. Rep. 80.

Dodge, J. Certain general views and conclusions will dispose of a considerable number of the very many objections raised by appellant to a recovery upon the guaranty bond, without the necessity of detailed consideration. Among such is the rule that neither falsity of any of the statements contained in plaintiff's so-called "applications," whether they be deemed representations or warranties, nor any omission upon which, under the bond, appellant might claim a forfeiture, can be available except as they have been expressly pleaded. The plaintiff is not required, in the first instance, to prove the truth of all the statements contained in his application, nor to negative all possible grounds of forfeiture. It is for the defendant to point out such of these as it elects to depend upon for defense. May v. Insurance Co., 25 Wis. 291, 3 Am. Rep. 76; Redman v. Ins. Co., 49 Wis. 431, 4 N. W. 591; Benedix v. Ins. Co., 78 Wis. 77, 47 N. W. 176; Johnston v. Ins. Co., 94 Wis. 119, 68 N. W. 868; Chambers v. Ins. Co., 64 Minn. 495, 67 N. W. 367, 58 Am. St. Rep. 549; Bank v. Ins. Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682.

A careful examination of the evidence discloses some which the jury might have deemed credible and sufficient to support their findings upon the first, second, fourth, fifth, and seventh issues mentioned in the statement of facts. True, as to several of these, apparently inconsistent statements were made by the plaintiff, but such inconsistencies were for the jury to weigh and resolve, and in their judgment to reach the real truth of such matters, and we are unable to say that there was entire lack of credible evidence to support their conclusions above catalogued.

The only remaining pleaded defense is the alleged failure of the plaintiff to limit the amount of his money in the hands of O'Brien, at any one time, to about $50. On this question the jury found with the defendant. The trial court ignored that finding upon two grounds, stated in his opinion: First, that the statement in the application on this subject was so indefinite as to refute the idea that it was a warranty; but, secondly, that

the finding was not supported by the evidence in a sense to defeat recovery, for the reason that only a general conduct of the business, whereby customarily a larger amount of money was allowed to be in O'Brien's hands could have such result, and that there was no evidence that such larger sum had ever been allowed to come into his hands at any one time until the time of his embezzlement, which was sporadic and out of the ordinary course of events, and which immediately aroused plaintiff to activity to put a stop to such conduct by discharging O'Brien. In this view of the law, we think the trial court was correct. The indemnity of this bond was against such misconduct of the employe in breach of his instructions and of the customary precautions which his employer exercised, and the fact that, when he undertook to acquire himself and embezzle his employer's money, he was able to make such attempts successful to the extent of some $106 before his delay in reporting and remitting had aroused his employer to suspicion and interference, was no proof that in the conduct of the business he had been allowed to exceed approximately the sum of $50. Apart from this one instance, there is no proof in the record as to the amount of his periodical collections which occurred during one week in each month; but it does appear that certain itemized lists of such collections were introduced in evidence, and were, of course, before the trial court in rendering his decision. These would very probably indicate, approximately at least, the amount which O'Brien customarily obtained on each of his monthly collecting tours. But the appellant has failed to preserve in the bill of exceptions any copy of these statements from which we can approximate that information. We must therefore, under the familiar rule that error is not to be presumed, but must be made to appear, assume that these statements served to support the trial court's conclusion that there was no evidence of a breach of this statement in the application, even if the same were deemed to be a warranty.

Another subject upon which much is said in appellant's brief is in the failure of plaintiff to immediately notify the defendant upon discovery of O'Brien's misconduct. His suspicions were not aroused until about the 18th of June, when he immediately went and found O'Brien in an unintelligible state of intoxication, made effort to regain from him the property in his hands, and, as soon as possible, to obtain information from him

and to protect himself as far as he could against the loss, which effort seemed to have occupied him until the 5th or 6th of July, when he returned home, and on the 7th July sent notice to the defendant. The court set aside the finding of the jury that this notice was given immediately, but held that the right of forfeiture which might be predicated upon such failure had been waived. This defense would seem to be unavailable to the defendant in any event, because not pleaded, but, since it was treated as before the trial court, we should perhaps say that we agree with his conclusion of waiver. Defendant made no objection on this ground, but called on the plaintiff to make effort to get a settlement with O'Brien, then to make up his itemized claim or proofs of loss, which were made about October 20th, and thereafter called upon plaintiff to take steps for the criminal prosecution of O'Brien in accordance with a provision contained in the bond, but later called upon him to aid an agent of the defendant in an extended investigation of the accounts to ascertain the amount of the shortage. Defendant contends that it could not be charged with waiver until it had knowledge of the delay in sending this notice. That may be conceded, but when in October it was furnished, with plaintiff's itemized claim, it would seem that it must have had such information, for that claim was required to give the dates of the embezzlements and other information. That itemized claim was in evidence, open to inspection by the trial court, but has not been included in the bill of exceptions, so that again we must indulge in the presumption, if necessary, that it supplied facts upon which the trial court based its conclusion. If information was then conveyed to the defendant of this delay in sending the notice, there can be no doubt that the calling on the plaintiff to take various steps thereafter and finally joining issue in this action without predicating any defense upon such delay, must be construed as a waiver thereof. Cannon v. Ins. Co., 53 Wis. 593, 11 N. W. 11; Kidder v. The Knights T. & M. Life Indemnity Co., 94 Wis. 538, 69 N. W. 364; Fraser v. Ins. Co., 114 Wis. 510, 90 N. W. 476.

The only remaining question is as to the proof of O'Brien's embezzlement. On this subject his entries, reports, and statements made in the course of his duties in the guarantied employment are admissible against the surety. Stephens v. Shafer, 48 Wis. 54, 65, 3 N. W. 835, 33 Am. Rep. 793; Clark v. Wilkin-

son, 59 Wis. 543, 551, 18 N. W. 481; Bank of Tarboro v. Fidelity & Deposit Co., 128 N. C. 366, 38 S. E. 908, 83 Am. St. Rep. 682; Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475. Proof was made of certain such statements and admissions from which, in connection with the accounts and records kept by plaintiff, he claimed to be able to state the amount, both of money and goods, which O'Brien had appropriated to his own use. Besides this, it was shown that defendant's agent, upon mutual investigation of such accounts and records, concurred with plaintiff in finding the shortage as stated and allowed by the judgment. This was sufficient to warrant the jury in finding embezzlement to that amount. We find no reason to reverse.

Judgment affirmed.

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b. Any material change in the duties of the principal will discharge a surety from liability on a fidelity bond.

FIRST NATIONAL BANK v. GERKE. 1888.

68 Md. 449; 13 Atl. Rep. 358; 6 Am. St. Rep. 453.

Appeal from Superior court of Baltimore city.

Action on a bond executed to plaintiff, the First National Bank of Baltimore, by John D. Lisle, principal, and Charles Gerke, surety, defendants. Judgment was rendered for defendant Gerke, and plaintiff appeals.

Alvery, C. J. This action was brought upon a bond by the appellant against John D. Lisle and the appellee, the latter being surety. Lisle, the principal in the bond, having absconded, was returned "not summoned." The bond bears date the 13th of August, 1867, and was given by Lisle upon his appointment by the appellant to the position of assistant bookkeeper in its banking house. The bond recites that "whereas, the above-bound John D. Lisle hath been duly appointed a clerk of the said First National Bank of Baltimore," therefore the condition of the obligation is such "that if the said John D. Lisle, for and during the time he shall continue in employment in the said First National Bank of Baltimore, shall faithfully and honestly perform all the duties and services in the said First

National Bank of Baltimore which shall, from time to time, be required of him by the board of directors of said bank, or the president or cashier thereof, or by or under their authority, and faithfully and honestly fulfill all the trusts that shall be by them, or by or under their authority in him reposed, in his said appointment of clerk of the said First National Bank of Baltimore, then this obligation to be void; otherwise, to be and remain in full force and virtue." The bond was duly accepted and approved by the board of directors as the "bond of John D. Lisle as clerk." The appellee pleaded general performance of the condition of the bond, and that plea was simply, in an informal way, traversed by the appellant, and thus an issue was forced, upon which the case was tried. The proof in the case shows that Lisle remained in the employ of the bank from a time prior to the date of the bond, in August, 1867, to the 27th day of January, 1887; and that during that time his clerical position, and the amount of his salary, were repeatedly changed. His duties and functions were not only multiplied and enlarged, but his responsibility, and his facility for peculation, were greatly increased. From being an assistant bookkeeper at the time the bond was given and accepted, he was in June, 1870, appointed to the position of deposit bookkeeper; and in November, 1871, he was made discount and foreign collection clerk. This latter position he held until January, 1872, when he was placed in the position of note teller and discount clerk, which position he held down to the time of his leaving the bank. The duties of his position of note teller and discount clerk required him to separate, and to collect as they fell due, all the notes discounted by the bank, and to collect all checks and drafts coming to the bank for collection; and the money thus received by him it was his duty to account for and pay over to the receiving teller at the end of each day, or at the beginning of the next day. These duties and functions pertained to the position assigned to Lisle, and held by him from January, 1872, to the time of his absconding; and all the large defalcations, amounting in the aggregate to near about $90,000, were committed by him during the time that he held the position of note teller and discount clerk. As assistant bookkeeper,—the position held by him at the time the bond was given,—it was no part of his duty to receive or pay out any of the moneys of the bank; and it was in proof that the appellee was informed by Lisle, at the

time the bond was given, that he (Lisle) was appointed the position of assistant bookkeeper in the bank.

Upon all the evidence, the appellant asked the court to instruct the jury that if they should find that Lisle, from the delivery of the bond to the time of his leaving the bank, acted as clerk in the bank, and that while so acting he received sums of money belonging to the bank which he fraudulently retained, the appellant was entitled to recover. This prayer was rejected by the court, and we think rightly so. It proceeds upon the theory that, as long as Lisle continued to hold a clerical position in the bank, the terms of the condition of the bond applied to him, and operated as a security for the faithful discharge of his duties, and is therefore liable for his defalcations, notwithstanding any radical change made in his position in the bank, and in the nature and character of the duties required of him in his changed position after the bond was given. This would certainly be a very severe construction of the bond; and to justify it the bond should contain very plain and imperative terms, such as we do not find it to contain. The bond should receive a reasonable construction, made in the view of the facts under which it was executed; and therefore the construction adopted by the court below would seem to be proper, under all the circumstances of the case. By the instruction given at the instance of the appellee, the jury were directed that if they should find that, when the bond was given, Lisle was but an assistant bookkeeper in the bank; that in 1872 he was taken from the position he then occupied, and was given the position of note teller and discount clerk, Lisle appropriated to his own use the money of the bank, and was enabled to do so because of the opportunity afforded to him in the handling of the money of the bank, in the course of the discharge of the duties of his position of note teller and discount clerk; and that no opportunity would have been offered him to appropriate such money in his position as assistant, or as individual bookkeeper,—then the appellant could not recover. In our judgment, this instruction placed the case fairly before the jury; and, as they are presumed to have found their verdict in accordance with the instruction, there is nothing in the case of which the appellant can complain. It is one of the well-established principles of law that the obligation of a surety is not to be extended beyond what the terms of the contract fairly import. A surety has a right to stand upon the very terms

of his contract; and if he does not assent to any variation of it, and a variation is made, such variation operates a release of the surety. In a case of a surety standing bound for the fidelity or capacity of a principal appointed to a particular office or employment, if the nature of the employment is so changed by the act of the employer that the risk of the surety is materially altered from what was contemplated by the parties at the time of entering into the bond, the surety has a right to say that his obligation does not extend to such altered state of things. This is a doctrine in regard to which the authorities all agree. Miller v. Stewart, 9 Wheat. 680; Pybus v. Gibb, 6 El. & Bl. 902; Bank v. Dickerson, 41 N. J. Law 448; Mumford v. Railroad Co., 2 Lea 393. And it is a principle of universal application that, in order to arrive at the intention of the parties, the contract itself must be read in the light of circumstances under which it was entered into. General or indefinite terms employed in the contract may be thus explained or restricted in their meaning and application; and the contract must be so construed as to give it such effect, and none other, as the parties intended at the time it was made. These principles are elementary; and applying them to the terms of the bond, when those terms are considered in reference to the facts of the case, there would seem to be no doubt of the correctness of the ruling of the court below. As we have said, regard must be had to the intention of the parties when the bond was executed; and whatever facts will shed light upon the question of intention may be considered in construing the bond. Mumford v. Railroad Co., *supra*. Hence we may look to the position held in the bank by Lisle at the time the bond was given. He had been appointed assistant bookkeeper, and it was with reference to that appointment that the bond was given to, and accepted by, the bank. The bond recites the fact that Lisle had been appointed a clerk in the bank, and the extrinsic facts identify the clerkship as that of assistant bookkeeper. That position, however, had not at the time of the bond given, and has never had, any of the duties and functions pertaining to it that pertain to the position of note teller and discount clerk, to which Lisle was subsequently appointed. This latter position was one entirely different from that of bookkeeper, and was of great responsibility, and, from its very nature, was of much greater risk and peril to the surety than the former position held by Lisle. It is true, the terms of the

condition of the bond are very large and comprehensive, but they all have reference to the previous appointment as clerk. By the terms of the bond it was certainly competent to the board of directors, or to the president or cashier, to impose additional consistent duties upon Lisle to those then pertaining to the position of bookkeeper; but not to impose duties upon him that would entirely change the nature and grade of his position in the bank, and enhance his responsibility, and thereby essentially increase the risk to the surety on his bond. This could only be done by the assent of the surety, and it is not pretended that such assent was ever obtained. And this is strictly in accordance with the principle maintained by this court in the case of Strawbridge v. Railroad Co., 14 Md. 360. In that case it was held that the surety was not exonerated; but it was so held because it was found that the nature of the agent's duties were not changed, and no new or different duty was imposed upon him by the alteration in the regulations of the company at the particular station. Indeed, it was conceded by the court that, if the employment and duties of the agent had been essentially changed, the surety would not have been liable; and no well-considered case has been cited that gives sanction to a different principle.

It follows from what we have said that the judgment below must be affirmed.

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c. A change of duty imposed by statute does not discharge the surety.

STATE v. SWINNEY. 1882.

60 Miss. 39; 45 Am. Rep. 405.

Appeal from the circuit court of Holmes county.

Hon. C. H. Campbell, J. On the 13th of March, 1882, an action was brought in the name of the State, suing for the use of Holmes county, against J. S. Hoskins and his sureties, on his bond as tax collector of that county, for two several sums of money, for the years 1876 and 1877 respectively, which, it was declared, he had collected and failed to pay over to the treasurer of the county as the law required of him and as he was bound by the terms of his bond to do.

The third plea set up the defence that "after the signing of said bond by said defendants, the said plaintiff, without the consent of the said defendants, on the twelfth day of January, 1877, by an act of the Legislature of the State of Mississippi, approved on said day and entitled 'An act to provide for the collection of the outstanding revenue for the fiscal year 1876,' altered, changed, and extended the time for the collection of taxes due the State of Mississippi and the county of Holmes, and the time for the payment thereof by the said Hoskins to the State and county treasuries; whereby said defendants were released as sureties on said bond."

The fourth plea contained the same defence as the third, except that the act of the legislature relied upon in the latter as releasing the defendants as sureties on the bond was an act entitled: "An act in relation to the public revenue and for other purposes," approved February 1, 1877. To the third and fourth pleas demurrers were filed and they, too, were overruled. The plaintiff declined to plead over and appealed to this court.

Campbell, C. J., delivered the opinion of the court.

We decline to follow the courts of Illinois, Tennessee and Missouri, in their views that sureties on the bond of a tax collector are discharged by an act of the legislature passed after the execution of the bond, without their consent, giving further time for the collection of taxes and settlement by the officer, and we embrace and declare the more just and politic doctrine of the courts of Virginia, Maryland, and North Carolina, and hold that the official bond of the tax collector is given with a full knowledge of the right of the legislature to alter the dates fixed by law for the collection of taxes and the settlement of the collector, and subject to the exercise of that right at the pleasure of the legislature, without the assent of the sureties. The Commonwealth v. Holmes, 25 Gratt 771; Smith v. The Commonwealth, 25 Gratt 780; The State v. Carleton, 1 Gill 249; Prairie v. Worth, 78 N. C. 169. See also Smith v. Peoria, 59 Ill. 412; Bennett v. The Auditor, 2 W. Va. 441; Cooley on Tax, 502.

The demurrer to the third and fourth pleas should have been sustained.

d. Sureties on a fidelity bond are entitled to reasonable notice of the principal's default and failure to give such notice will discharge sureties.

SINGER MAN'FG CO. v. LITTLER. 1881.

56 Iowa 601; 90 N. W. Rep. 905.

Appeal from Wapello circuit court.

Action at law. The cause was tried to the court below without a jury, and judgment was rendered for defendants. Plaintiff appeals. The facts of the case appear in the opinion.

BECK, J. 1. The action is upon a bond executed by Littler as principal, and the other defendants as sureties, conditioned that Littler shall pay to plaintiff all his indebtedness to it, existing before or afterwards to exist, whether upon notes, accounts, or in any other manner. The petition alleges that Littler became agent of plaintiff for the sale of sewing machines, and the bond in suit was executed when he was appointed, to secure plaintiff from loss that might accrue on account of his employment. The petition alleges that Littler became delinquent in his payments and executed a note to plaintiff, upon which a judgment was afterward rendered for the amount of his indebtedness. The sureties answered the petition, alleging that Littler and the plaintiff entered into an agreement whereby Littler became plaintiff's agent, and became bound to pay to plaintiff money upon the sales of sewing machines, or upon the indorsement of paper taken upon such sales, as stipulated in the agreement. The agreement provides that either party may terminate the contract at their pleasure. Other conditions need not be set out.

The answer further alleges that plaintiff had terminated Littler's agency before the note was executed by him, and that the defendants had no notice at any time that Littler was in default, or that any claim was made by plaintiff against them upon the bond. Upon a demurrer to this answer, the court held that the defendants were entitled to notice of the amount due from Littler within a reasonable time after the settlement between him and plaintiff. The court found upon the trial that no such notice was given to the defendants, wherefore they suffered loss, and that plaintiff, therefore, is not entitled to recover.

2. The controlling question in the case, and the only one argued by counsel, involves the correctness of the court's ruling in holding that defendants are not liable for the reason that notice was not given them of the extent of Littler's liability within a reasonable time after his agency was terminated, and his indebtedness fixed by his settlement with plaintiff. The ruling of the court, we think, is correct, and in accord with Davis Sewing Machine Co. v. Mills, 8 N. W. 356. We held in that case, "where the guaranty is a continuing one, and the parties must have understood their liability thereunder would be increased and diminished from time to time, and the guaranty is uncertain as to when it will cease to be binding upon the guarantor, and when the party indemnified has the power at pleasure to annul and put an end to the contract guaranteed, without the knowledge of the guarantor, he is entitled to notice, within a reasonable time after the transactions guaranteed are closed, of the amount of his liability thereunder." It will be observed, upon considering the statement of the terms of the contract guaranteed as above set out, that they are within this rule, and that under it the defendants in this case are not liable, in the absence of the notice contemplated therein.

3. But counsel for plaintiff, in an ingenious argument, attempt to distinguish this case from Davis Sewing Machine Co. v. Mills. They insist that while the contract in that case was a guaranty, in this case defendants are not guarantors, but are sureties for Littler, and are jointly liable with him upon an original contract. The error of this position is apparent. Littler was or was about to become indebted to plaintiff upon the contract under which he was appointed agent. Defendants were not bound upon that contract. Neither were they bound upon the notes, accounts, acceptances, or upon any contract upon which Littler became indebted to plaintiff. They became first and only bound upon the bond, whereby they guaranteed that Littler would pay his indebtedness to plaintiff in whatever form it assumed. A guarantor becomes bound for the performance of a prior or collateral contract upon which the principal is alone indebted. A surety is bound with the principal upon the contract under which the principal's indebtedness arises. This is a familiar doctrine of the law. Upon applying it to the facts of the case, it will be seen that defendants are guarantors, and not sureties, for the performance of the contract upon which Littler's

indebtedness to plaintiff arose. They were therefore entitled to notice under the rule of Davis Sewing Machine Co. v. Mills.

It may be observed that guarantors are often called sureties. We use the term "sureties" in the foregoing discussion, to describe one who is bound by a contract with his principal—who joins with his principal in the execution of the contract, and becomes pecuniarily liable thereon. But, as we have seen, a guarantor—the surety in a contract of guaranty—is not primarily liable upon the principal's contracts, and only becomes liable upon his default. A guarantor, under this rule, is entitled to notice of the amount of his liability within a reasonable time after that liability is determined by the transaction between the original debtor and creditor.

It is our opinion that the judgment of the circuit court ought to be affirmed.

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e. If obligee retains principal in service after he has knowledge of his default it will relieve sureties from liability for subsequent defaults.

SAINT v. WHEELER. 1891.

95 Ala. 362; 36 Am. St. Rep. 210; 10 So. Rep. 539.

Action by the Wheeler and Wilson Manufacturing Company, a corporation, to recover the sum of eight hundred dollars collected for it by R. F. Saint while employed by it as a collector, which sum he failed to pay on demand. The action was founded on a sealed contract, by which the plaintiff agreed to employ said Saint as its collector, and the defendants R. F. Saint, A. J. Crossthwaite, C. M. Wright, J. F. Hall, and J. R. Spraggins bound themselves in the sum of one thousand dollars for the faithful performance by said Saint of all duties as collector for plaintiff. Judgment for the plaintiff, and the defendants appealed.

McClellan, J. The contract sued on is not a guaranty, but one of suretyship. Crossthwaite and the other defendants, who undertake that Saint shall faithfully perform his contract with the company, are sureties of Saint, and not guarantors. The

distinction between the two classes of undertakings is often shadowy, and often not observed by judges and text-writers; but that there is a substantive distinction, involving not infrequently important consequences, is, of course, not to be doubted. (1) It seems to lie in this: that when the sponsors for another assume a primary and direct liability, whether conditional or not in the sense of being immediate or postponed till some subsequent occurrence, to the creditors, they are sureties; but when this responsibility is secondary and collateral to that of the principal, they are guarantors. Or, as otherwise stated, if they (2) undertake to pay money, or do any other act, in the event their principal fails therein, they are sureties; but, if they assume the performance only in the event the principal is unable (3) to perform, they are guarantors. Or, yet another and more concise statement: a surety is one who undertakes to pay if the debtor do not; a guarantor, if the debtor cannot; the first is sponsor, absolutely and directly, for the principal's acts, the latter only for the principal's ability to do the act: "the one is the insurer of the debt, the other an insurer of the solvency of the debtor." This is the essential distinction. There is another going as well to its form. The contract of suretyship is the joint and several contract of the principal and surety: "The contract of the guarantor is his own separate undertaking, in which the principal does not join." Indeed, it has been held, pretermitting all other considerations, that no contract joined in by the debtor and another can be one of guaranty on the part of the latter (McMillan v. Bull's Head Bank, 32 Ind. 11; 2 Am. Rep. 323; 10 Am. Law Reg. 435, and notes), though we apprehend that a case might be put involving only secondary liability on the sponsors, though the undertaking be signed also by the principal. However that may be, it is certain that in most cases the joint execution of a contract by the principal and another operates to exclude the idea of a guaranty, and that in all cases such fact is an index pointing to suretyship. See Brandt on Suretyship and Guaranty, secs. 1 and 2; 9 Am. & Eng. Ency. of Law, p. 68; Marberger v. Pott, 16 Pa. St. 9; 55 Am. Dec. 479; Allen v. Hubert, 49 Pa. St. 259; Reigart v. White, 52 Pa. St. 438; Kramph v. Hatz, 52 Pa. St. 525; Birdsall v. Heacock, 32 Ohio St. 177; 30 Am. Rep. 572; 18 Am. Law Reg. 751, and notes; Hartman v. First Nat. Bank, 103 Pa. St. 581;

Courtis v. Dennis, 7 Met. 510; Kearnes v. Montgomery, 4 W. Va. 29; Walker v. Forbes, 25 Ala. 139, 60 Am. Dec. 489.

Applying these principles to the bond sued on, the conclusion must be that it is not a guaranty, but a suretyship, on the part of Crossthwaite, Wright, Hall, and Spraggins. It is not their separate undertaking, but the principal also executes it. While they employ the word "guarantee," they directly obligate themselves along with Saint to pay, absolutely and wholly irrespective of Saint's solvency or insolvency, all damages which may result to the obligee from his default. Not only so, but they expressly stipulate that the company need not exhaust its remedies against Saint before proceeding against them. It is, in other words, and in short, a primary undertaking on their part, not secondary and collateral, to pay to the company in the event of Saint's failure, and not an undertaking to pay only in the event of Saint's default and inability to pay. They are sureties of Saint, and not his guarantors, and their rights depend upon the law applicable to the former relation, and not upon the law controlling the latter.

2. One of the important differences in the operation, effect and discharge of the two contracts finds illustration in this case. The undertaking of guaranty in a case like this is primarily an offer, and does not become a binding obligation until it is accepted, and notice of acceptance has been given to the guarantor. Till this has been done, it cannot be said that there has been that meeting of the minds of the parties which is essential to all contracts: Davis Sewing Machine Co. v. Richards, 115 U. S. 524; Walker v. Forbes, 25 Ala. 139; 60 Am. Dec. 489. Being thus a mere offer, it may be recalled, as of course, at any time before notice of acceptance. Indeed, there are authorities which hold that, even after acceptance and notice thereof, the guarantor may revoke it by notice that he will be no longer bound, unless he has received a continuing or independent consideration which he does not renounce, or unless the guarantee has acted upon it in such a way as that revocation would be inequitable and to his detriment; and, in cases of continuing guaranty, the effect of such revocation is to confine the guarantor's liability to past transactions: 2 Parsons on Contracts 30; Allan v. Kenning, 9 Bing. 618; Offord v. Davies, 12 Com. B., N. S., 748; Tischler v. Hofheimer, 83 Va. 35.

All this is otherwise with respect to the contract of surety.

He is bound originally in all respects upon the same footing as the principal. His is not an offer depending for efficacy upon acceptance, but an absolute contract depending for efficacy upon complete execution, and its execution is completed by delivery. From that moment his liability continues until discharged in accordance with stipulations of the instrument, or by some unauthorized act or omission of the obligee violative of his rights under the instrument, or by a valid release. Nothing that he can do outside of the letter of the bond can free him from the duties and liabilities it imposes. He cannot assert the right to revoke, unless the right is therein nominated. As was said by the English court, "if he desired to have the right to terminate his suretyship on notice, he should have so specified in his contract"; Calvert v. Gordon, 3 Man. & R. 124; Brandt on Suretyship and Guaranty, §§ 113, 114.

3. The evidence here as to the release of Crossthwaite tends to show no more than this: that after the bond had been delivered to plaintiff, and after its officers had advised Saint that they were ready for him to enter on the discharge of his duties under the contract secured by the bond, he, Crossthwaite requested plaintiff to take his name off the paper. No assent to this request is shown, but only an inquiry on the part of plaintiff as to Crossthwaite's reasons for desiring to be released. It would seem that the court itself should have decided that these facts did not release Crossthwaite; but the question appears to have been submitted to the jury. If this submission, or any of the instructions accompanying it, was erroneous, no injury resulted to defendants, since the jury determined the point against the alleged release, as the court should have done, assuming it to have been a question of law. On the other hand, if it were a question for the jury, it is to be presumed they were properly instructed as to the rules of law which should guide them to its solution, as no exceptions were reserved in that regard.

4. The exceptions which were reserved on this part of the case are to charges given, and to the refusal to give charges asked by defendants, declaratory of the effect which the discharge of Crossthwaite, if the jury found he had been discharged, would have upon the liability of his sureties. As the jury found expressly that he had not been discharged, these exceptions present mere abstractions not necessary to be decided. We have no doubt, however, but that the law in this respect was correctly

declared by the court to be, that the release of Crossthwaite operated to release the other sureties only to the extent of his aliquot share of the liability; Brandt on Suretyship and Guaranty, § 383; Burge on Suretyship, 386; Klingensmith v. Klingensmith, 31 Pa. St. 460; Ex parte Gifford, 6 Ves. 805; Schock v. Miller, 10 Pa. St. 401; Currier v. Baker, 51 N. H. 613; Jemison v. Governor, 47 Ala. 390.

5. The sureties of Saint insisted on the trial below that they were discharged from all liability on the bond by reason of certain alleged changes made in the original contract between their principal and the company by the parties thereto, after they became sureties for its faithful performance, and without their knowledge, consent, or ratification. It is not pretended that the paper writing evidencing this contract was ever altered in any respect, but that its terms were changed by subsequent parol agreements, in the following respects, among others to be presently considered: 1. That under this contract, which constituted Saint a collector only for the company, he was instructed and required to take up and resell sewing-machines, when he found the notes for the purchase money of the same, and which were in his hands for collection, could not be collected; and, 2. That he was authorized to discount or sell the notes placed in his hands for collection, when the same could not be otherwise realized upon. Nothing is claimed in this action on account of Saint's misconduct in respect of any property thus taken up or resold, or of any note discounted by him, or with respect to the proceeds of any such sale or discount. If these duties were such as usually devolved upon a collector for a sewing-machine company—as to which there is no evidence in this record, and no necessity for any under the present complaint—it may be that Saint's sureties would be responsible for their faithful performance on his part to the same extent as for money collected on notes in his hands: Detroit Sav. Bank v. Ziegler, 49 Mich. 157; 43 Am. Rep. 456.

However that may be, the fact that they were imposed upon him, assuming they were not covered by his contract, and hence were in addition to those assumed by the other defendant, cannot relieve his sureties from liability with respect to those which were imposed by the contract, unless the imposition of these new duties and their performance by Saint rendered impossible, or materially hindered or impeded, the proper and faithful per-

formance of the service originally undertaken. There is no evidence here that these new and additional duties interfered with the collection of notes placed in his hands for that purpose; nor is any claim made against his sureties on account of any failure to collect such notes. But the gravamen of the action is, that he 1. Did collect these notes, and converted the proceeds to his own use; or 2. That he failed to deliver such notes to the company on the termination of his employment. We are unable to conceive how the fact that he had other property and funds—machines and the proceeds of discounted notes—in his possession, could have hindered or impeded him in the account for funds collected or notes remaining in his hands, or could in any degree have conduced to his conversion of such funds or notes. To the contrary, it would seem, in all reason, that the possession of this other property and these other funds, out of which he might have met the necessities which presumably induced his malversions, would have lessened the chances of misappropriation of the funds and property for which his sureties were responsible, and thus have lessened, instead of increased, their exposure to liability. We are very clear to the conclusion, that the imposition of these new duties not covered by the contract did not discharge the sureties with respect to those embraced in the contract, and as to which no change, in the particulars we are considering, was attempted: Mayor of New York v. Kelly, 98 N. Y. 467, 50 Am. Rep. 699; People v. Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Home Life Ins. Co. v. Potter, 4 Mo. App. 594; Commonwealth v. Holmes, 25 Gratt. 771; Home Savings Bank v. Traube, 75 Mo. 199, 42 Am. Rep. 402; Gaussen v. United States, 97 U. S. 584; Jones v. United States, 18 Wall. 662; Ryan v. Morton, 65 Tex. 258; First Nat. Bank v. Gerke, 68 Md. 449, 6 Am. St. Rep. 453, and note 458; Detroit Sav. Bank v. Ziegler, 49 Mich. 157, 43 Am. Rep. 456.

6. The sureties further defended on the ground that the contract between Saint and the company was changed, without their knowledge or assent, by a subsequent parol agreement entered into by their principal and Walls, representing the company, whereby Saint's compensation was to be reduced from fifty dollars per month to nine dollars per week. There was evidence of such agreement, but none that it was supported by a consideration, or that it was approved by plaintiff. And it appears from other evidence that all of Wall's contracts were subject to

approval or rejection by other officers of the corporation, and that plaintiff settled with Saint on a basis as to compensation of fifty dollars per month. We think on these facts, this defense is without merit: Steele v. Mills, 68 Iowa 406.

Equally untenable, in our opinion, is the defense which proceeds on the ground that the instruction of plaintiff to Saint to retain his salary and expenses out of collections made by him was a material change of the provision of the contract which required him to remit to the company on the first day of each week, the amount collected up to that day. The contract provided for Saint's compensation and expenses, but was silent as to the manner of payment. The method of payment thus adopted tended to decrease the risks of the sureties, as affording less occasion for conversion by Saint than had payments to him been made only at the end of each month.

7. It is well settled, that mere indulgence of the creditor to the principal, the mere forbearance to take steps to enforce a liability upon default, or even an understanding between them looking to payment of the deficit presently due at some time in the future, which does not, for the want of a consideration to support it, or other infirmity, prevent the creditor from immediately demanding payment, will not discharge the surety. Hence, what took place between Walls and Saint in February, 1888, in regard to allowing the latter further time to make good the sum he had theretofore converted, afforded no defense to the sureties with respect to the sum then due: 3 Brickell's Digest, p. 715, §§ 36-43; 9 Am. & Eng. Ency. of Law, p. 83, n. 4; Morris Canal, etc. Co. v. Van Vorst, 21 N. J. L. 100.

8. The sureties, however, on another aspect of the transaction last above referred to between Saint and Wells, predicate a defense going to the amount of their liability. They insist that Saint was at that time a defaulter by embezzlement; that Walls knew this fact, and, without giving any notice of it to them, he, acting for the company, continued Saint in its employment, and committed other funds to him which were also converted; and that this action of Walls discharged them from all liability for funds thus converted after he knew of Saint's dishonesty. The general principle here relied on, finds abundant support in the authorities. In the leading case of Phillips v. Foxall, L. R. 7 Q. B. 666, the proposition is thus stated by QUAIN, J.: "We think that in a case of continuing guaranty for the honesty of a serv-

ant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guaranty relates, and if, instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.'' And this proposition is rested upon considerations which, to our minds, are eminently satisfactory. Premising that had a default involving dishonesty, and occurring before the surety became bound, been known to the creditor, and concealed by him from the surety, the effect would have been to discharge the surety, a doctrine which appears to be well established, the court proceeds to declare the same result from a concealment of dishonesty pending a continuing guaranty, as follows: ''One of the reasons usually given for the holding that such a concealment (at the time the surety enters into the obligation) would discharge the surety, is that it is only reasonable to suppose that such a fact, if known to him, would necessarily have influenced his judgment as to whether he would enter into the contract or not; and in the same manner, it seems to us, equally reasonable to suppose that it never could have entered into the contemplation of the parties that, after the servant's dishonesty in the service had been discovered, the guaranty should continue to apply to his future conduct, when the master chose, for his own purposes, to continue the servant in his employ without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance, and until its termination.'' The citations directly supporting this conclusion are *quasi dicta* of Lord Redesdale in Smith v. Bank of Scotland, 1 Dow. 287, and of Malins, V. C., in Burgess v. Eve, 13 L. R. Eq. 450; but the case was subsequently followed in England and the United States, and nowhere abstractly doubted. We follow these authorities, and adopt their conclusions as sound in principle: Sanderson v. Aston, L. R. 8 Exch. 73; Brandt on Suretyship and Guaranty, § 368; Roberts v. Donovan, 70 Cal. 108; Charlotte etc. R. R. Co. v. Gow, 59 Ga. 685; 27 Am. Rep. 403; Atlantic etc. Tel. Co. v.

Barnes, 64 N. Y. 385; 21 Am. Rep. 621; Newark v. Stout, 52 N. J. L. 35.

9. Indeed, the foregoing doctrine is not controverted in this case; but it is contended that it has no application as between a corporation, being the creditor, and the surety of one of its officers or employees. And there are not a few adjudged cases which support this view. The argument upon which this conclusion is reached is, that "corporations can act only by officers or agents. They do not guarantee to the sureties of one officer the fidelity of the others. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his (the principal's) infidelity, ought not in reason, and does not in law or equity, relieve the sureties from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank, or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound"; Pittsburg etc. Ry. Co. v. Shaeffer, 59 Pa. St. 356; Taylor v. Bank of Ky., 2 J. J. March. 565; McShane v. Howard Bank, 73 Md. 135; Brandt on Suretyship and Guaranty, § 369.

It is to be noted that these cases—and there may be others which follow them—hold, not only that where there is a conspiracy between officers of a corporation to embezzle its funds, the dereliction of neither officer will discharge the sureties of the other, but also where there is a negligent failure on the part of one such officer to give notice to the sureties of another of his dishonesty, and a continuance of the dishonest servant in the corporate service without the assent of his sureties given with a knowledge of the default, the sureties are not discharged from liability for subsequent deficits, though confessedly they would be were the creditor an individual or copartnership. It may be that the first position stated is sound. It would seem to be immaterial whether an original default results from the dishonesty of the principal alone, or conjointly from his and the dereliction of another corporate employee. The sureties are bound to answer for the results of any form of original dishonesty; that is what they insure against. It may be too, doubtless would be, that no concealment by a conspirator of the fact of the principal's original default, no continuance in the service by an officer of the corporation *in pari delicto* with the principal, would

suffice to discharge the surety, since all of this is malversion participated in by the principal, and violative of the contract which the sureties have undertaken to see faithfully performed. Moreover, the acts and omissions of one agent of a corporation, in conspiracy with another to filch their common master, in furtherance of their nefarious purposes, are, in the nature of things, without authorization by implication or otherwise, and can in no just sense be said to be acts of omissions of the corporation. Upon this idea, it may be that where one officer, though not originally participating in the default of another, conceals that default from the sureties of his fellow-officer and from the company, for sinister purposes of his own, and not as representing his employer, or in his interest, and continues the defaulting officer in the service, the sureties would not be discharged as to subsequent deficits. Thus far we may go with the learned courts in which the cases we have cited were decided.

But even our conservatism in following adjudications of courts of acknowledged ability and learning can in no degree constrain us to adopt the second proposition stated above. We cannot subscribe to the doctrine, that there is the radical difference insisted on, or any material difference in fact, between the efficacy of acts and omissions of an agent of a creditor corporation, having authority in the premises, on the one hand, and the acts and omissions of the agent of an individual creditor, or of the individual himself, on the other, in respect of condoning the defalcation of any employee, omitting notice to the employee's sureties, and continuing him in the service, to operate a release of the sureties as to subsequent deficits of the dishonest employee. No doctrine of the law is more familiar than that notice to an agent, within the scope of his agency, is notice to the principal; and this doctrine has in no connection been applied more frequently and uniformly than to corporations and their agents. Indeed, there is an absolute necessity in all cases for its application to corporations, since they act and can be dealt with only through agents. Notice to one agent of a corporation, with respect to a matter covered by his agency, must be as efficacious as to its directors or to its president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing. In the case at bar, Walls had authority to make the contract with Saint, subject to the

approval of another agent of the corporation. He did in fact make it. This contract contained a provision for its termination by either party at pleasure. The evidence was that Walls had full supervision over Saint, and over all matters embraced in the contract made by Saint. It was at least a fair inference to be drawn by the jury, that he could terminate the employment either under the stipulation in the instrument, or for a violation of it by Saint, subject to the approval of the other officer or agent referred to. There is no ground to doubt but that to have given the sureties notice of Saint's default would have been in the line of his duty and authority. Equally clear it must be, that their assent to him to a continuance of Saint's employment would have bound them for the subsequent defalcation; and, on the other hand, it must be, that their dissent from such continuance communicated to him would have had the same effect as had it been given to any other officer of the creditor company. He had notice of the default. He received it as representing the company. In that capacity, he condoned it, made arrangements with Saint to make it good, continued the employment, and continued Saint's opportunities to embezzle the company's funds, on the supposed security for its reimbursement afforded by the obligation of the sureties, who had contracted on the assumption of Saint's honesty, and were entitled to know of his dishonesty when it should develop, as a condition to their subsequent liability. There is no intimation of connivance or conspiracy on the part of Walls with Saint to defraud either the creditor or the sureties. What he did was doubtless done in good faith, and for the interest, as he supposed, of his employer. It was in the line of his employment. If his further duty was to report his action to another officer of the company, the presumption is that he made such a report; there is nothing in the record to rebut such presumption. We cannot hesitate to affirm, on this state of the case, that what he did which ought not to have been done, and what he failed to do which ought to have been done, were the acts and omissions of the corporation, involving the same consequences in all respects as if the corporate entity had been capable of direct personal action, so to speak, and had acted as he did, or as if he himself, and not Wheeler and Wilson Manufacturing Company, had been the creditor.

We suppose it would not be contended in any quarter that if these sureties had in terms stipulated that, in case of Saint's

default, notice to them and assent on their part should be a condition precedent to their liability for further defaults they could be held without such notice and assent; and yet, under the doctrine announced in the cases cited, such a stipulation would be entirely nugatory, and the failure of every agent and officer, all with knowledge of the stipulation and of the default, to notify the sureties thereof would avail them nothing. Yet it would manifestly be no more the duty of the corporation to give a notice so stipulated for than to give a notice made a part of the contract by the law of the land. And such doctrine, carried to its legitimate results, would defeat all corporate liability growing out of the contracts, acts, and omissions of agents clothed with power and authority in the premises. That it is unsound is demonstrated not only in logic, but upon analogous authority. As we have seen, the English court, in the leading case of Phillips v. Foxall, L. R. 7 Q. B. 666, which has never been called in question there or in this country, either as to the result or the reasoning upon which it was reached, supported the principle declared upon the same considerations which underlie the doctrine that if an employer have knowledge of the previous dishonesty of a servant, and accept a guaranty for his future honesty without disclosing such dishonesty to the surety, this is a fraud upon the latter, and he is not bound. Now suppose an officer of a corporation charged with the duty of finding surety for another officer, knowing of such previous dishonesty on the part of such officer, takes bond for his faithful and honest performance of the services contracted for without giving the surety notice of the prior dereliction, would not that omission of duty on his part stand upon the same plane before the law, and involve precisely the same consequences, as if the default had occurred after the surety has bound himself, and the officer had then failed to give him notice of it? If the corporation is not prejudiced by the omission in one instance, can it be in the other? If the corporation is responsible for the dereliction of its agent with respect to notice of a previous default, would it not also be responsible for its agent's failure to give notice of the subsequent default? There can, in our opinion, be but one answer to these questions. There can be no possible difference in the duty of the agent and the corporation's liability for its non-performance in the two cases. And the law is well settled, that the failure of the agent of a corporation to give notice of

such previous dishonesty avoids the obligation of the sureties for future misconduct. Singularly enough, too, some of the cases holding this doctrine distinctly and broadly were decided by courts, those of Pennsylvania and Kentucky, which hold the contrary view as to notice of after-occurring embezzlement: Brandt on Suretyship and Guaranty, §§ 365-368; Wayne v. Commercial Nat. Bank, 52 Pa. St. 344; Graves v. Lebanon Nat. Bank, 10 Bush. 23, 19 Am. Rep. 50; Franklin Bank v. Cooper, 36 Me. 179, 39 Me. 542.

Our conclusion on this point is further supported by the cases of Charlotte etc. R. R. Co. v. Gow, 59 Ga. 685, 27 Am. Rep. 403, and Atlantic etc. Tel. Co. v. Barnes, 64 N. Y. 385, 21 Am. Rep. 621, which, without discussing this point, in effect hold that the omission of an officer of a corporation to notify a surety of the default of his principle in a case like this, and the continuance by such officer of the employment of the principal, will discharge the surety as to all defaults arising during the subsequent service. And in Newark v. Stout, 52 N. J. L. 35, the New Jersey court, while adhering generally to the doctrine we have been criticising, yet held that if the default and dishonesty of a municipal officer be brought to the attention of the city council, which is clothed with the power to remove him, and he is allowed to continue in the service without notice to and assent on the part of the surety, the latter will be discharged from liability as to all subsequent defaults. It does not appear to have been so considered by that court, but it is manifest that this is a radical departure from the doctrine held by the Pennsylvania, Kentucky, Maryland, and other courts, and relied on by appellee here, and goes strongly in support of the contrary rule, which we believe to be the sound one.

It is also to be noticed that much reliance is had by the courts holding that a surety of one officer of a corporation is not discharged by the acts or omissions of another in the particulars under consideration, on cases decided by the supreme court of the United States in respect of sureties of public officers. Indeed it would seem that this whole doctrine had its inception in this class of cases. This can but be considered an infirmative circumstance going to the soundness as authority of those cases which involve sureties of corporation officers. There is a palpable and manifest distinction between the two classes of cases bearing directly upon this question, which, while requiring the ap-

plication of this rule to public officers, on the grounds of public policy, and that laches should not be imputed to the government, does not require its application to officers of corporations.

We hold that if Walls, while acting for the corporation, and in the capacity of its agent, with respect to the matters and things involved in Saint's contract, received notice of such a conversion of its funds by Saint as amounted to embezzlement, or involved dishonesty, and, without imparting this knowledge to the sureties, and receiving their assent thereto, continued him in the service, that the sureties are not liable for Saint's subsequent defaults. Charges 5, 9 and 7, requested for defendants, when referred to the evidence, were correct expositions of the law, as we understand, in this connection. The refusal of the court to give them involved error which must work a reversal of the case. Most of the other assignments of error are covered by the points considered in the first part of this opinion. Such of the assignments as are not discussed have been considered, and found to be without merit.

The judgment is reversed, and the cause remanded.

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f. The principles of construction applicable to insurance policies are applied to fidelity bonds.

T. M. SINCLAIR & CO. v. NATIONAL SURETY CO. 1906.
— Iowa —; 107 N. W. Rep. 184.

DEEMER, J. Prior to August 30, 1901, the firm of Higgins & Ogilvie was appointed by plaintiff as its broker or commission merchant for Dawson, in the Yukon district of Alaska, to handle its meat products in that district. The firm was to receive the goods, pay freight thereon when not prepaid, care for and dispose of the product for cash or gold dust, and deposit from day to day the proceeds from sales in a named bank at Dawson for and on account of plaintiff, and to make at least weekly remittances to plaintiff's representative at Portland, Ore. Plaintiff was to pay freight, duty, and insurance on the goods, drayage, rent of warehouse, furnish watchman for the goods, and to bill them to the firm f. o. b. Portland, at its jobbing prices, freight and other charges added. The firm of Higgins & Ogilvie was to sell the goods at a named price and to guaranty payment of all goods sold. When goods were sold, they were to be billed to the purchaser in triplicate, one of which was to be mailed to

plaintiff at Portland, Ore., on the day of sale or delivery of the goods, and when the whole of any shipment should be sold the brokers were required to render plaintiff an "account sales," showing gross amount realized, deducting commissions, expenses, etc., addressed to plaintiff at Portland, Ore.; and no claims were to be allowed for damaged goods, short weights, or otherwise, without a statement of the facts, and allowances made thereof either by plaintiff or the bank at Dawson. At the end of each month the broker was to send to plaintiff at Portland an account current, showing transactions for the month, and a weekly statement was also required from the broker, showing the amount of unsold goods and of cash on hand. It was also required to furnish monthly statements of commissions earned or claimed by it. As compensation, the broker was to receive one-half the net profits on the goods. The first shipment under this contract was made by plaintiff on May 28, 1901. For an agreed premium, defendant, a surety company, on August 31, 1901, undertook to make good any losses which plaintiff might sustain on account of the personal dishonesty of Higgins & Ogilvie in the conduct of plaintiff's business from July 14, 1901, to July 15, 1902; liability being limited to the sum of $2,000. On the 16th day of November, 1901, defendant, in consideration of an increased premium, credit being given for the unearned premium on the original bond, increased the liability on the bond to the sum of $10,000. It is claimed that plaintiff suffered loss on account of the personal dishonesty of the firm or of its members, and it asked judgment on each bond—on the first to the full amount thereof, and on the second to the amount of nearly $8,500. The case went to trial upon issue joined, resulting in a verdict for plaintiff in sum of $6,656.20.

Defendant admitted the execution of the bonds, but pleaded fraud in the procurement thereof. It also pleaded immunity from liability growing out of a breach of the brokerage contract by plaintiff. It further pleaded plaintiff's failure to make frequent audits and examinations of its brokers' accounts, and neglect to use reasonable steps and precautions to prevent any act on the part of its brokers which would render defendant liable, as it promised it would do by the terms of its engagement with the defendant. It also averred that whatever losses plaintiff suffered were due to its own fault, and not to the personal dishonesty of its brokers. Failure to furnish proper and timely

proofs of loss as provided by the terms of the bonds was also relied upon as a defense. A reply was filed, pleading an estoppel upon defendant to deny its liability on the second bond, and averring that plaintiff had fully complied with all the conditions of the bonds in suit. After the case had been partially tried defendant filed an amendment to its answer, setting up some other defenses; but on plaintiff's motion this was stricken, and the case was finally tried upon the issues heretofore stated.

It appears that plaintiff made five shipments of meats to its Dawson brokers. The first left Seattle June 6, 1901, and amounted, with freight added, to $7,926.26; the second was made August 5, 1901, and amounted to $468.80; the third, August 27, 1901, amounting to $1,456.51; the fourth in September, 1901, amounting to $4,293.02, and the fifth September 26, 1901, amounting to $2,916.13. Higgins & Ogilvie made no acknowledgment of the receipt of any of the shipments after the first, and it seems that plaintiff never made any inquiries with reference thereto at any time. The brokers did not comply with the terms of their contract with plaintiff requiring them to make daily deposits and weekly remittances; nor did they make the required triplicate invoices, or account sales, nor weekly or monthly reports. Plaintiff did not make any audit or examination of Higgins & Ogilvie's accounts, statements, or books, and no settlement has ever been made between them. It is claimed, however, that plaintiff suffered on account of their personal dishonesty to an amount exceeding the verdict returned by the jury. The last reported sale by Higgins & Ogilvie was under date of September, 1901; and the last deposit made by them in the Canadian Bank, save one for a gross sale, was of date September 10, 1901. The accounts of sales did not correspond with the deposit slips down to the time the bond was increased; there being a shortage of about $200. The first bond covered defalcations between July 14, 1901, and July 15, 1902, and the second was an increase of the first, and by its terms covered the same period. This new bond or increase was made on November 16, 1901, although the premium was not paid until January 8, 1902, some 23 days after it was due. Higgins & Ogilvie abandoned the business at Dawson on December 4, 1901, and turned the property then in their possession over to one Driscoll, and he, in turn, on or about March 1st of the next year, surrendered the same to the Canadian Bank, in which the brokers were to make deposits, so that

Higgins & Ogilvie were not in possession of any of the goods after December 4, 1901, and, of course, defendant is not responsible for the goods or their proceeds after that date. Nor is it liable for any defalcations occurring before the time covered by the first bond.

The alleged errors chiefly relied upon relate to the ruling of the court denying to defendant the right to amend its answer during the trial, to the instructions given and refused, and to the insufficiency of the evidence to support the verdict. In view of the disposition made of the case, it is unimportant that we consider the ruling on the amendment to the answer.

The first point to which we shall refer has relation to the capacity in which Higgins & Ogilvie were acting when the claimed defalcations occurred. The bond insures plaintiff against the personal dishonesty of Higgins & Ogilvie in the performance of their duties as plaintiff's brokers at Dawson, Y. D.; and the petition alleges that the firm of Higgins & Ogilvie, as such brokers, obtained the money for which this action is brought through personal dishonesty. This is denied by defendant in its answer; and it is further alleged that plaintiff misrepresented the capacity in which Higgins & Ogilvie were acting, well knowing that they were not acting as brokers, but that in truth they were commission merchants and not brokers. There is no testimony to support the plea of fraud, save that the original contract of employment and the bonds are in evidence; and these show that the conduct of Higgins & Ogilvie as brokers is guaranteed, and that they were, in fact, entitled to and had possession of the goods under their contract with plaintiff appointing them as its "brokers or commission merchants." This is not enough to establish the allegation of fraud. But it is said that only while acting as brokers was their conduct guaranteed, and that the testimony shows they were not so acting when the defalcations occurred. It is doubtless true that Higgins & Ogilvie were, strictly speaking, commission merchants, and not brokers, for they had possession of and absolute control of the merchandise shipped them, and had power to collect the purchase price of goods sold. Edwards v. Hoeffinghoff (C. C.) 38 Fed. 641; Slack v. Tucker, 23 Wall. (U. S.) 330, 23 L. Ed. 143; Braun v. City, 110 Ill. 194. A broker has as a general rule neither the possession of the goods nor authority to collect the purchase price of those which he sells. But, aside from this technical dis-

tinction arising from the use of names without more, a broker is in practice often intrusted with possession of the property and given authority to collect; thus combining his character as broker with that of a factor or commission man. Mechem on Agency, § 980; citing Barry v. Boninger, 46 Md. 59.

Moreover, it appears in this case, that defendant knew how Higgins & Ogilvie were acting, and with this knowledge it described them as brokers in the bond which it wrote for itself. This being true, it is in no position to say that they were not acting as brokers when the default occurred. There was no change in their duties and responsibilities at any time, and, as defendant chose its own language in which to describe them, it cannot be heard to say that it did not insure them in the position in which they were acting.

2. The seventeenth provision of the bond contained this stipulation: "The receipt and retention hereof * * * shall be taken and held as a covenant * * * that the employer will make frequent audits and examinations, and at all times during the term hereof take and use all reasonable steps and precautions, to detect and prevent any act upon the part of any employee, which would tend to render the company liable for any loss." We have seen that at no time did plaintiff make any audit or examination of the books, business, accounts, or statements of Higgins & Ogilvie until after they had abandoned its employment. The trial court instructed the jury in its seventh instruction that the provision of the bond requiring plaintiff to make frequent audits and examinations was so vague and indefinite that it could not be determined what was intended thereby; and that the jury should entirely disregard defendant's claim that it had not been complied with. The other requirement that plaintiff should use all reasonable steps and precautions to prevent any act of the brokers which would render defendant liable was submitted to the jury under an instruction which is not very seriously complained of. Error is predicated upon instruction 7, and upon the court's failure to give defendant's tenth request, to the effect that, if plaintiff did not make frequent audits and examinations of Higgins & Ogilvie's accounts, then it could not recover.

It is true, of course, that a contract may be so vague and indefinite as that it is impossible to collect from it the intent of the parties thereto; and in such cases the instrument is void,

and no recovery may be had thereon, either at law or in equity. Rue v. Rue, 21 N. J. Law, 377; Thomson v. Gortner, 73 Md. 474, 21 Atl. 371; Reed v. Lowe (Utah) 29 Pac. 740. But it is with great reluctance that courts reject any agreement as insensible or unintelligible. One of the canons of construction is to give effect to every provision of a contract, if possible and practicable for the reason that the parties themselves evidently intended something thereby, and it is not for courts to reject the same unless it be so vague and uncertain that neither a general nor a particular intent can be gathered therefrom. In other words, a contract should be so construed, if possible, as to give effect to each and every provision thereof. German Ins. Co. v. Roost (Ohio) 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711; McKay v. Barnett (Utah) 60 Pac. 1100, 50 L. R. A. 371 As between two constructions, each reasonable, one of which will accomplish the intention of the parties and make the contract an enforceable one, and the other which will make it unenforceable and meaningless, the former is to be preferred. Shreffler v. Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626; Alfree v. Gates, 82 Iowa, 19, 47 N. W. 993; Powers v. Clark, 127 N. Y. 417, 28 N. E. 402. As the provision in this contract was inserted by defendant and for its benefit, any ambiguity therein is to be taken most strongly against the party who chose the language. Gillet v. Bank, 160 N. Y. 549, 55 N. E. 292; Paul v. Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758; Mueller v. University, 195 Ill. 236, 63 N. E. 110, 88 Am St. Rep. 194. But it is said that this rule is resorted to only when all other tenets of construction fail. Patterson v. Gage, 11 Colo. 50, 16 Pac. 560. And manifestly this must be so; for it presupposes a binding contract of some kind, and is primarily a rule of construction, and not of destruction. To arrive at the intent of the parties, the surrounding circumstances should be taken into account, and the court should place itself as nearly as may be in the position of the parties who made the contract. It should look to the subject-matter of the contract, the relation of the parties thereto, and the objects and ends intended to be accomplished thereby. In so doing, it should take into consideration other contracts having reference to or bearing upon the one before it, especially where the latter has reference to the same subject-matter as the former, and is the means whereby the former was carried out. Drennen v.

Satterfield, 119 Ala. 84, 24 So. 723; Melone v. Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127.

With these rules in mind, we now go to the provision in question, and find that it obligates plaintiff to make frequent audits and examinations to detect and prevent any act of its employe which would tend to render defendant liable.

Putting ourselves as nearly as we may in the position of the parties when this bond was given, we find that plaintiff had a contract with Higgins & Ogilvie which obligated the latter to make various reports, statements, deposits, etc., which, if properly checked up and examined, would show any defaults or mismanagement on their part. Of this defendant is presumed to have had notice, and it undertook to become responsible for the conduct of the firm under its contract with plaintiff, provided plaintiff would make frequent audits and examinations to detect and prevent, etc. Are these words "frequent audits and examinations" so indefinite and insensible in view of the situation thus described as to be unintelligible, and therefore void? We think not. "To audit" is to examine and adjust, as to audit and adjust accounts. Primarily it means a hearing; but not necessarily so. What was it which was to be audited and examined? Manifestly the accounts and statements which Higgins & Ogilvie were required by the terms of their contract with plaintiff from time to time to make. No hearing was contemplated for the brokers were in Alaska, and plaintiff's branch house in Portland, Ore. So that a personal hearing was not contemplated. The reports and statements were to take the place of personal supervision, and the audit and examination was manifestly to be of these. There was evidence to show that plaintiff made no such audits or examinations as it promised; and this issue should have been submitted to the jury under instructions. The term "frequent" should be construed with reference to the situation of the parties, and means no more than with reasonable frequency, depending upon the situation of the parties, and the existing obligations of the contract with reference to accounts, etc. We are constrained to hold that the trial court was in error in declaring the provision of the bond now under consideration invalid. The error was not cured by the subsequent instruction requiring plaintiff to take and use reasonable steps and precautions to detect and prevent any act on the part of the employe tending to render defendant liable; for the

jury may well have said, taking the instructions together, that this did not include the auditing or examination of the brokers' accounts, statements, etc. Our conclusion on this branch of the case finds support in the following: Board v. Citizens' Co., 30 U. C. P. 132; Harbour Com. v. Guaranty Co., 22 Can. Sup. Ct. 542; Rice v. Fidelity Co., 103 Fed. 429, 43 C. C. A. 270; Hunt v. Fidelity Co., 99 Fed. 243, 39 C. C. A. 496. Appellee seems to rely principally upon the rule of construction already alluded to, to the effect that the language should be construed most strongly against the defendant. This we concede to be the rule, but it does not meet the proposition announced by the trial court that the provision is void for uncertainty. The rule cannot be used to refine away the terms of a contract or to destroy its validity as an enforceable obligation. Guaranty Co. v. Bank, 183 U. S. 419, 22 Sup. Ct. 124, 46 L. Ed. 253.

3. Failure on plaintiff's part to furnish proofs of loss is relied upon as a defense. It seems that plaintiff attempted to make two separate proofs of loss; one under the $2,000 bond, and the other under the increased one. As to the second, defendant denied all liability under the increased bond, because of want of authority on the part of its agent who granted the increase and received the premium. This was a clear waiver of any proofs of loss, and of defects, if any, in those furnished; for an attempt to make or correct them would have been an idle ceremony. Stephenson v. Bankers' Ass'n, 108 Iowa, 646, 79 N. W. 459, and cases cited. As to proof of loss under the first bond, this was furnished or attempted to be furnished May 15, 1902. It was retained by defendant without objection, suggestion, or complaint until June 27th, when it returned the same to plaintiff with a demand for new proof. The bond provided that proofs should be made within six months from the time liability thereunder terminated. The time for making proofs under the first bond expired May 16, 1902; and defendant, although receiving the original proofs in time, made no objection thereto until June 27th, and then demanded new proofs, which, if furnished, must have been after the time therefor had expired. In these circumstances defendant was bound to make its objections to the proofs within a reasonable time, to the end that they might be met, if possible. As it failed to do so, it waived any further proofs. Young v. Ins. Co., 45 Iowa 383, 24 Am. Rep. 784; Dyer v. Ins. Co., 103 Iowa 531, 72 N. W. 681; Green v. Ins.

Co., 84 Iowa 137, 50 N. W. 558. This matter of waiver of proofs was properly submitted to the jury.

4. Defendant insists that it was for plaintiff to show full compliance with each and all of the conditions of the bond, and that the jury should have been so instructed. But that is not the rule of this court. It was for defendant to plead and prove breach of these conditions. Jones v. Accident Ass'n, 92 Iowa, 658, 61 N. W. 485.

5. The bond provided that defendant should not be liable for any sum whatever which the employe at the commencement of the bond term owed his employer. As it was given to cover the personal dishonesty of the employe, and not to guaranty payment of his debt, it is manifest, we think, that defendant is not liable for any money collected by Higgins & Ogilvie before the bond went into effect, and which was afterwards dishonestly converted by them. This thought was not presented to the jury by the trial court, although request was made of it to do so in proper instructions. Indeed, the contrary proposition was announced by the court. In this there was error prejudicial to appellant. At the time of the execution of the first bond Higgins & Ogilvie had been plaintiff's brokers, handling goods for some time, and under the evidence was indebted to plaintiff for goods sold. As to this amount, defendant was not responsible, no matter if the money thus received was thereafter dishonestly converted.

6. The first bond went into effect July 14, 1901, and the increased bond was given November 16, 1901. In this connection defendant asked an instruction as follows: "If you find from all the evidence that any of the meats, produce, or merchandise, or the proceeds thereof were wrongfully converted to the use of the firm of Higgins & Ogilvie, or either of them, between July 13, 1901, and March 3, 1902, and if you further find from the evidence that said wrongful conversion of said meats and products, or the proceeds thereof, if you find there was any, was wrongfully converted to the use of said Higgins & Ogilvie, or either of them, by said firm, or either member thereof, was all done by them prior to November 16, 1901, then you are instructed that the defendant is not liable to plaintiff under the contract sued on in an amount greater than $2,000 which is the amount of the original bond, and your verdict should not exceed that sum." This instruction announced the law,. and should

have been given. It was not covered by any of those read to the jury.

7. In the twelfth instruction the court said that if Higgins & Ogilvie, or either of them, knowingly failed and refused to account for and turn over plaintiff's property when demanded by plaintiff or the proceeds of the sales thereof then in their possession, as required by their contract, this would be such personal dishonesty as would render defendant liable on its bond. In other words, a technical conversion was treated by the trial court as a dishonest act on the part of the employe. Manifestly this cannot be the law. That the instruction was prejudicial is clear. Higgins & Ogilvie abandoned the business in December of the year 1901. Thereafter they had no personal charge of the goods, and could not have been guilty of any personal dishonesty in connection therewith. In this action defendant is sought to be held for the value of all the goods shipped Higgins & Ogilvie, less proper and legitimate credits. If the jury followed the instructions just referred to, it was justified in charging defendant with the goods or the proceeds thereof while in the hands of Driscoll or the Canadian Bank. This, of course, cannot be the measure of defendant's liability.

8. If it be true, as plaintiff seems to contend, that liability on the increased bond did not begin until the increase was made, then the trial court was in error in its fourteenth instruction, regarding the extent of defendant's liability under this increased bond. We shall not set out the instruction in full. Suffice it to say that it made defendant liable for all moneys in the hands of Higgins & Ogilvie at the time the increase of bond was granted, although such moneys were not dishonestly appropriated until after the bond was increased. We are not to be understood as saying that the rule announced is incorrect. Our position here is based upon what we understand to be plaintiff's view of defendant's liability under the original and the increased bond. It is contended for appellant, as we understand it, that defendant's liability is no different than it would have been had there been two separate and independent bonds. If that be true, then it is difficult to see how defendant can be made liable for money owing plaintiff at the time the increased bond was given. We are in so much doubt on this proposition that we make no definite pronouncement thereon. It may be that the instruction viewed in the light of the expressed terms of the bond

as increased is correct. Indeed, as an abstract proposition, we are inclined to think it is correct. What we have said is bottomed upon what we understand to be counsel's contention as to defendant's liability under the original and the increased bond. If wrong in this, then we are not prepared to say there was error in the instruction as given.

Other matters argued need not be considered, for they are either without merit or are not likely to arise upon a retrial. But for the errors pointed out the judgment must be reversed and the cause remanded for a retrial.

Appellant's motion to strike appellee's amended abstract, which was submitted with the case, is overruled.

Reversed and remanded.

WILLOUGHBY v. FIDELITY & DEPOSIT CO. 1906.

16 Okl. 546; 85 Pac. Rep. 713.

GILLETTE, J. In this case, the plaintiff, J. A. Willoughby, as receiver of the Capitol National Bank of Guthrie, sues the Fidelity & Deposit Company of Maryland upon the bond of the defendant company, guarantying the faithful discharge of the duties of Chas. E. Billingsley, as president of the Capitol National Bank. A copy of the bond with all its indorsements is attached to and made a part of the plaintiff's petition. The bond provides, among other things: "Amount, $10,000.00. Annual premium, $40.00. Baltimore, Md. Whereas Chas. E. Billingsley, Guthrie, Ok., hereafter called the 'employee' has been appointed to the position of president, in the service of the Capitol National Bank, Guthrie, Oklahoma, hereafter called the 'employer' and whereas, the employer has delivered to the Fidelity Deposit Company of Md., a corporation of the state of Maryland, hereafter called the 'Company,' certain statements in writing relative to the employee, his conduct, duties, employment and accounts, the manner of conducting the business of the employer, and other things connected with the issuance of this bond, which, together with any other statements in writing, hereafter made by the employer to the company relating to any such matters, do and shall constitute the basis and form part of

this contract, or any continuation thereof, and shall be warranted; and it is hereby agreed, that any such statement, made in writing by the president, cashier, or any officer or director of the employer, shall be considered the statements of the employer within the meaning hereof. Now, therefore, in consideration of the sum of $40.00 paid as premium for the period from January 1, 1904, to January 1, 1905, at 12 o'clock noon, and upon the faith of said warranties of said employer as aforesaid, it is hereby agreed that, subject to the obligations imposed by this bond, on the employer the performance of which shall be condition precedent to the right on the part of the employer to recover under this bond, the company shall, at the expiration of three months next after proof of a pecuniary loss as hereinafter mentioned, has been given to the company, reimburse the employer to the extent of the sum of $10,000.00, and no further for such pecuniary loss of money, securities, or other personal property, as the employer shall have sustained by any dishonest act or acts committed by the employee in the performance of the duties of the office or position in the service of the employer hereinbefore referred to, or of such other office or position as employee may be subsequently appointed to or called upon to fill by the employer, as such duties have been or may hereafter be stated in writing by the employer to the company, and occurring during the continuance of this bond, and discovered at any time within six months after the expiration or cancellation of this bond, or in case of the death, resignation, or removal of the employee, prior to the expiration or cancellation of the bond, within six months after such death, resignation, or removal."

Then follows conditions of the bond that are not material in the consideration of this case. The defendant surety company answered admitting the giving of the bond, but denying liability, because, as it claimed, the bond was procured by false and fraudulent representations made by the Capitol National Bank to the defendant surety company, concerning the said Chas. E. Billingsley, his conduct, duties, employment, and accounts. A copy of the letter of the defendant surety company, to the Capitol National Bank, asking for information, together with such of the questions, answers, and statements made by R. S. Briggs, the assistant cashier, as are necessary for the consideration of this case, are as follows:

"Baltimore, December 5th, 1903. To the Capitol National Bank, Guthrie, O. T.: An application has been made to this company to issue to you a Fidelity Bond for Mr. C. E. Billingsley, as president in your service at Guthrie, O. T., to the amount of $———. Before passing on the said application the company must have answers to the following questions: Very respectfully yours, Edwin Warfield, President."

"5. (a) Is he now (C. E. Billingsley) or has been from any cause indebted to the bank or its officers? A. No. (b) If so, give particulars, stating amount, how incurred, and how payment is secured. Not answered. It is agreed that the above answers shall be warranties, and shall constitute the basis and form part of the bond, or any continuation or continuations of the same that may be issued by the Fidelity & Deposit Company of Maryland, to the undersigned upon the person above named, and it is agreed that the duties, powers and remunerations of the employee and obligations of the employer as stated in the above warranty shall remain unchanged during the currency of this bond or any continuation or continuations thereof. Dated at Guthrie this 22d day of December, 1903. Capitol National Bank, by R. S. Briggs, Ass't Cashier, Official Capacity."

"This must be returned to the home office, Baltimore, Md., before bond will be issued."

The reply is an unverified general denial, and a special denial of the authority of R. S. Briggs, the assistant cashier, to bind the bank by his answers to said questions, and by the agreement he undertook to make on behalf of the bank. Upon the trial of the cause it was shown by the plaintiff, and by the proper cross-examination of plaintiff's witnesses, that notwithstanding the statement of the said R. S. Briggs, the assistant cashier, in answer to question 5a, that Mr. Billingsley was not indebted to the bank, he was at the time the statement was made indebted to the bank on his own note of $5,150, and his own overdraft of $35,693.24. The bond given by the defendant surety company and accepted by the bank expressly provided that the statements in writing relative to C. E. Billingsley, his conduct, duties, employment, and account, and other things connected with the issuance of the bond, should constitute the basis, and form a part of the contract, and should be warranted; and that any statements made in writing by any officer of the bank should be considered the statements of the bank; and in consideration of the sum of $40, and upon the faith of such warranties of the said

bank the $10,000 bond sued on herein was given by the surety company, and accepted by the bank. When the plaintiff rested, the defendant surety company demurred to the evidence upon the ground that the plaintiff had failed to prove facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. The demurrer to the evidence was sustained, and the case dismissed at the cost of the plaintiff, and he brings it to this court claiming that the trial court erred in sustaining the demurrer.

In this court the plaintiff contends that whatever his rights might have proved to be upon a full and final hearing, the demurrer to the evidence was not well taken, and should not have been sustained, based as it was on the pleadings and plaintiff's evidence alone. Let us examine for a moment the issues and status of the case when plaintiff rested, and the demurrer was interposed by the defendant, and sustained by the court. A copy of the bond sued on was attached to and made a part of the plaintiff's petition, and was admitted by the defendant in its answer, so it was fully before the court. The questions and answers thereto, as made by the cashier, and the statements attached to them, were attached to and made a part of the defendant's answer, and not being denied under oath under section 3986 of our statutes of 1893, were taken as true, and therefore were fully before the court. By the terms of the bond itself these questions and answers, and the statement attached thereto were made a part of the bond, and constituted the basis of the contract, and were stipulated to be warranties; and upon the faith of such warranties the bond was issued by the surety company, and accepted by the bank. The pleadings and evidence also disclosed that in December, 1903, application was made to the defendant surety company for this bond for C. E. Billingsley, as president of the Capitol National Bank; that the surety company by its letter of December 5th submitted certain questions to the bank to be answered by it; that on December 22, 1903, the questions were answered by R. S. Briggs, the assistant cashier of the bank, and he answered them falsely, knowing at the time that the answers were false; that on December 30, 1903, the defendant surety company issued its bond, and the bank accepted it, upon the express written condition contained in the body of the bond itself, that the statements, answers, and representations so made should constitute the basis, and form a part

of the contract; and that the bond was issued by the surety company and accepted by the bank upon the faith of the said warranty and representations; that during the years covered by the life of the bond the doors of the bank were closed, and it was placed in the hands of a receiver, and later the receiver brought this action to recover from the surety company on the bond in question, claiming that the said C. E. Billingsley, the bonded president, had defaulted in a sum far in excess of the amount of the bond. In this condition of the case we think the question was fairly presented upon the demurrer to the evidence as to whether or not a cause of action had been proved in favor of the plaintiff, as against the defendant. A careful examination of the record has convinced us that the plaintiff did not make out his case, and that the demurrer to the evidence was well taken and properly sustained. We shall base our conclusion upon but one of the grounds urged in the court below.

Fidelity and guaranty insurance is of comparatively modern origin, and has not had the consideration in the books that has been bestowed upon fire and life insurance. But while it is of but comparatively modern origin, it is nevertheless already a thoroughly established and legitimate line of insurance that has come to stay, and indeed is filling a most important part in the modern business world. From reason and analogy, however, it is plain that many of the principles underlying and governing fire and life insurance must apply to fidelity and guaranty insurance. It has long been the settled law in fire and life insurance that where statements and representations have been made by the insured as the basis for the insurance, and by the terms of the policy issued and accepted, said statements are made a part of the policy itself, any material false and fraudulent statement made by the insured will avoid the policy. The reason for this rule is sound. A person unsound in body or mind, who falsely and knowingly represents himself to be sound physically, in order to secure life insurance, and stipulates that his false representations shall be treated as warranties, and as part of the policy itself, should not be allowed to recover. The man seeking fire insurance who falsely and knowingly represents his property to be free from incumbrance when it is incumbered for more than its value, and such false representations are made a part of the policy of insurance, should not be allowed to recover for a loss by fire, for reasons too apparent to admit of considera-

tion here. In the case of Dwight et al. v. Germania Life Insurance Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729, the court says: "Where the assured, in a policy of life insurance, warrants the truth of the answers made by him to questions in his application, compliance with such warranty is a condition of the validity of the contract of insurance, and it must be assumed that any substantial deviation from truth in such answers is material to the risk and renders the policy void." Also see the following cases, and cases cited therein: Price v. Phœnix Mutual Life Insurance Co., 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166; Jeffries v. Economic Mutual Life Ins. Co., 22 Wall. 47, 22 L. Ed. 833.

We are not entirely without precedent in fidelity guaranty insurance cases. In the case of the American Credit Indemnity Company v. Carrollton Furniture Manufacturing Co., 95 Fed. 111, 36 C. C. A. 671, this language is used: "When there is a definite agreement that the application for insurance is a part of the contract, and the statements in the application are expressly declared to be warranties, they are treated as such, and not merely as representations, and must be strictly construed, or the policy will not take effect." See, also, Hunt v. Fidelity & Casualty Co., 99 Fed. 242, 39 C. C. A. 496, and authorities there cited. In the Hunt Case, the court says: "The promissory statement, having been made part of the contract between the parties, by the terms both of the policy and the declarations, was, in effect, a warranty, which the assured was bound to fulfill in substance and according to its meaning. Jeffries v. Insurance Company, 22 Wall. 53, 22 L. Ed. 833; Insurance Co. v. France, 91 U. S. 513, 22 L. Ed. 401; Brady v. Association, 9 C. C. A. 252, 60 Fed. 727; Mo. K. T. Trust Co. v. Herman National Bank, 23 C. C. A. 65, 77 Fed. 117. It is quite immaterial that the statement is not called warranty. It is a stipulation embodied in the contract by the words of the policy for the performance of future acts, and, as such, is an express warranty." We are aware that many cases may be found in the books where doubts arise as to whether the warranties made by the assured were untrue as made, or were made in good faith, and doubts yet remain of their untruth. In such cases a disputed question of fact arises for the jury to determine. A few courts have gone so far as to hold that the fact that the warranties when made were false is not enough, but that it must be further

shown that they were also known to be false by the assured; but the great weight of authority holds that proof of the material falsity of the warranties defeats the right of recovery.

In the case at bar, however, we are not called on to make any fine distinction. The representations of the assistant cashier, which were contracted to be warranties, were that C. E. Billingsley, the defaulting president, was not indebted to the bank in any sum. These warranties were outrageously untrue, and were known to be untrue by the assistant cashier when he made them, as shown by his evidence. At the time he represented that said Billingsley did not owe the bank, he, Billingsley, was indebted to the bank on his own note of $5,151, and interest, and on his own overdraft in the sum of $35,693.34. Slight or immaterial errors may be conceded not to avoid the liability of the surety company, but with such glaring misrepresentations as the above, the court need only to look to the face of the transaction to detect its bad faith, when in connection with the testimony of the assistant cashier, that he knew of the above indebtedness of C. E. Billingsley, when he represented to the surety company that said Billingsley was not indebted to the bank at all. But we are not confined in the case at bar, to the authorities of life and fire insurance alone, as many cases have arisen and have been passed on, not only by the state courts, but by the Supreme Court of the United States, two of which will be later considered in the discussion of the second question presented in this case. The Guarantee Company v. Mechanics, etc., Co., 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253; Fidelity Deposit Company v. Courtney, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193.

This leads us to the second point necessary to our consideration. It is claimed by the plaintiff in error that even though it be true that willful, false statements made by one seeking fidelity insurance, which are made the basis of and form part of the bond itself, may defeat the plaintiff's rights to recover, yet such a proposition can have no application to the case at bar, and cannot affect the rights of the plaintiff in this action, for the reason that the said Briggs, the assistant cashier, had no authority to make said statement, or to bind the bank in any way, and that, as he was only the assistant cashier, no presumption arises that he acted with authority, and his authority to act was not shown in the trial of the case. This bond was issued by the defendant surety company, and accepted by the bank upon

the faith of the correctness of the statements, and said statements were made warranties and became a part of the bond itself, and so became and were a part of the contract sued on by the plaintiff. It is the well-settled law that a party seeking to recover upon a contract cannot claim the benefits arising therefrom, and at the same time repudiate its burdens. To allow the receiver of the bank, while suing on the contract, to question the authority of the assistant cashier to make the statements and misrepresentations which are a part of the contract sued on, would be to allow him to accept its benefits and reject its burdens. To secure the bond on which its receiver sues, the bank, by its assistant cashier, made the representations which form a part of the bond itself, and it does not lie in the mouth of the receiver, while suing on the bond, to repudiate the statements and warranties made by the assistant cashier upon which the bond was secured. The Supreme Court of the United States has said: "The information solicited was such as was proper to be asked of and communicated by the bank, and as the renewal was presumably made upon the faith of the statements contained in the certificate, the bank ought not to be heard, while seeking to obtain the benefits of the stipulation agreed to be performed by the surety, to deny the authority of its officers to make the representations which induced the surety to again bind itself to be answerable for the faithful performance by McKnight of the duties of his employment." Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193; Railway Companies v. Keokuk Bridge Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157.

The plaintiff in error lays great stress upon the case of the American Surety Co. v. Pauly, 170 U. S. 134, 18 Sup. Ct. 552, 42 L. Ed. 977. That was a case wherein Geo. N. O'Brien, as cashier of the California National Bank sought and secured an indemnity bond from the surety company in the sum of $15,000. In his negotiations for this bond he transmitted to the surety company a strong letter of recommendation from one J. W. Collins, the president of said bank. Collins also secured from said surety company a $25,000 bond for himself. During the life of these bonds O'Brien and Collins, acting together, wrecked the bank, and its doors were closed. The surety company refused payment, and suit was brought against it. It was contended that the president of the bank had made false represen-

tations concerning O'Brien, his conduct, his character, accounts, and integrity, in order to enable O'Brien to secure the bond, and that the receiver of the bank should not be allowed to recover on the bond secured by the fraud of the president; but the court held the surety company liable, and upon the authority in that case the plaintiff in error maintains that the surety company in this case should also be held liable. In that case the court said: "None of the cases cited embrace the present one. In the first place the procuring of a bond for O'Brien in order that he might become qualified to act as cashier, was no part of the business of the bank, nor within the scope of any duty imposed upon Collins as president of the bank. It was the business of O'Brien to obtain and present an acceptable bond. And it was for the bank by its constituted authorities to accept or reject the bond so presented. The bank did not authorize Collins to give nor was it aware he gave, nor was he entitled by virtue of his office as president to sign any certificate as to the efficiency, fidelity, or integrity of O'Brien. No relationship existed between the bank and the surety company until O'Brien presented to the former the bond in suit. What, therefore, Collins assumed in his capacity as president to certify as to O'Brien's fidelity and integrity, was not within the course of the business of the bank nor within any authority he possessed. He could not create such authority by assuming to have it."

It will be noted that the court here decides that the recommendation of the president of the bank was not authorized by the bank itself, and that being outside of the scope of the duties and authority of the president, the recommendation is held not to be that of the bank, and hence not binding upon the bank. But it will also be noted that the court says that no relationship existed between the bank and the surety company until O'Brien presented to the bank the bond in suit. Under such circumstances we think the conclusion of the court entirely in accord with the great weight of authorities, and were the facts in the case at bar in accord with those in the Pauley Case, we would regard it as a case in point and controlling. But in the case now under consideration it is not true that no relations existed between the bank and the surety company until C. E. Billingsley presented his bond to the bank. On the other hand application having been made to the surety company for a bond, the surety company, on December 5, 1903, wrote to the

bank the letter of inquiry which we have hereinbefore set forth. The letter of inquiry, it will be noted, was addressed to the bank and not to R. S. Briggs, the assistant cashier. The assistant cashier, on December 22, 1903, answered the questions and falsely stated that C. E. Billingsley was not indebted to the bank in any sum. He also signed the agreement following the questions, and a part of the same document, agreeing that the answers to the questions should be warranties and constitute the basis, and form a part of the bond to be issued by the surety company. All this occurred prior to the issuance of the bond, while in the Pauley case no letter of inquiry was addressed to the bank, and it was not agreed that the statements of the president upon which the bond was obtained should constitute warranties and be the basis for the bond. In short, no relations existed between the bank and the surety company until O'Brien presented his bond to the bank. When the bond of C. E. Billingsley, in the case at bar, was later issued on the 30th day of December, 1903, it expressly provided that in consideration of the sum of $40, and upon the faith of the warranties of the said bank (referring to the warranty signed by R. S. Briggs, cashier) the bond was issued. Not only, then, was the bond issued on the faith of the correctness of the answers and statements of the assistant cashier but it was also accepted by the bank upon the faith of the correctness of said statements. We think that these facts take this case entirely outside of the rule laid down in the Pauley case.

Nor are we alone in this conclusion, for the question has been twice before the Supreme Court of the United States in more recent cases than the Pauley Case, and in these subsequent cases that case has been distinguished to such an extent that it cannot, as we have heretofore said, fairly be regarded as a case applying here. In the case of the Guarantee Co. v. Mechanics, etc., Co., 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253, Chief Justice FULLER uses this language: "It also results that there can be no recovery at all on the cashier's bond. If the bank had observed the stipulation in the teller's bond, to which we have referred, it is obvious there would have been no cashier's bond, and the question would not have arisen. But this it did not do, and the bond was given. The bond provided that the company covenanted with the bank in reliance on the statement and declaration of the president on behalf of the

bank, and on the bank's strict observance of the contract; that any misstatement of a material fact in the declaration should invalidate the bond, etc.; that any written answers or statements made by or on behalf of said employer in regard to or in connection with the conduct, duties, accounts, or methods of supervision of the said employe delivered to the company either prior to the issue of this bond, or to any renewal thereof, or at any time during its currency, should be held to be warranties thereof, and form a basis of this guaranty, or of its continuance. The statements were required to be and were made on behalf of the bank, and the president acted for the bank in doing so; and the bonds were procured by the bank, and the bank paid the premium. There can be no doubt that the bank was responsible for the representations of its cashier in the one instance, and its president in the other, in procuring these contracts of indemnity. The representations made in the declaration on which the cashier's bond was issued were clearly misrepresentations. In Pauley's case, the president and cashier were confederates in the dishonesty of the cashier, for the purpose of defrauding the bank; and also it was held no part of the duties of the president, under the circumstances there disclosed, to certify the integrity of the cashier, as he did.''

In the still later case of Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193, Justice WHITE says: ''In Guaranty Co. v. Mechanics, etc., Co., 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253, this court recognize as binding upon the bank a certificate given by one of its officers, embodying replies to questions asked by the guaranty company respecting one of the employes of the bank, although no proof was introduced that special authority had been conferred upon the officer to make the certificate. Nor does the ruling in American Surety Company v. Pauly, 170 U. S. 156, 18 Sup. Ct. 552, 42 L. Ed. 977, warrant the claim that it is an authority against the admissibility of the certificate here in question. In the bond considered in the Pauley case it was not agreed that the statements of the president upon which the bond was obtained, should be the basis of the bond. The answers made by the person who was president of the bank to the interrogatories of the surety company were but mere commendation by one individual of another individual, at a time when, as said by the court, 'no relation existed between the bank and the surety company.'

Again, in the Pauley case, no letter of inquiry was addressed to the bank, unlike the practice pursued with respect to the renewal here in controversy, and the letter, whose contents in the Pauley case was claimed to be binding on the bank, was written by one who was not charged with the duties of conducting the correspondence of the bank.'' Entertaining the views that we do, we think that the plaintiff clearly failed to establish facts sufficient to entitle him to recover, and that the demurrer to the evidence was well taken, and properly sustained. The conclusions here reached make it unnecessary to pass upon other questions presented in briefs of counsel.

The judgment of the court below will be affirmed. All the Justices concurring, except PANCOAST, J., who sat in the trial of cause in the court below, and BURFORD, C. J., who declined to take any part in said cause, for the reason that he is a creditor of said insolvent bank.

End

CHAPTER XVI.

NEGLIGENCE OF OFFICERS OF A PUBLIC OBLIGEE.

a. Sureties are not discharged by the negligence or misconduct of the officers of a public obligee.

HART v. UNITED STATES. 1877.

95 U. S. 316.

Error to the Circuit Court of the United States for the Northern District of Ohio.

This suit was brought by the United States, May 29, 1872, against Hosmer, Hart, and Stahl, on a distiller's bond, executed by them May 29, 1871, in the sum of $5,000, and conditioned to be void if said Hosmer should faithfully comply with all the provisions of law relating to the duties and business of distillers, and pay all penalties incurred or fines imposed on him for a violation of any of said provisions, and should not suffer the tract or lot of land on which the distillery stood, or any part thereof, to be incumbered by mortgage, judgment or other lien during the time in which he should carry on said business.

The breach alleged was the non-payment by said Hosmer of $3,000, demanded of him, being the amount of tax on six thousand gallons of spirits, which he had distilled after the first day of June, 1871. He made no defense. The other defendants filed three pleas: 1. That the bond was never delivered to the plaintiff; that the assessor had no authority of law to approve it; and that neither the collector nor any other officer of the plaintiff had authority to receive it. 2. That the bond was a common distiller's bond, and that they signed it merely as sureties for Hosmer, without consideration, and for his accommodation; that, six days before its execution, Hosmer, without their knowledge, incumbered the ground upon which the distillery stood, by his mortgage of the same to one Dempsey, which was duly recorded May 25, 1871; that the plaintiff did not require, nor did Hosmer file with the assessor, the written consent of Dempsey that the lien of the United States for taxes and penalties should have priority to the mortgage, and that the title should, in case of forfeiture, vest in the United States, discharged of said mortgage; nor was Hosmer required to, nor did he, execute an indemnity bond against said mortgage, as required by the act of Congress approved April 10, 1869, but that the bond sued on was approved without the filing of such consent or the taking of such indemnity bond; that, by reason of the non-payment by Hosmer of the taxes on distilled spirits which were chargeable, and a lien upon said ground, a part of it was distrained and sold for $6,100, which sum, if the amount of Dempsey's mortgage had not been deducted therefrom, would have been sufficient to pay Hosmer's indebtedness to the United States. 3. That the taxes charged and sued for were assessed against Hosmer on spirits he had distilled, and were a first and paramount lien thereon; but that the collector of internal revenue for the district, without the knowledge or assent of the defendants, and without first requiring the payment of the taxes thereon, permitted him to remove from the bonded warehouse a quantity of said spirits,—more than sufficient to pay any just claim of the plaintiff.

On motion of the plaintiff, all of the first plea, except so much as averred the non-delivery of the bond sued on, was stricken out. Demurrers to the second and third were sustained, whereupon the defendants excepted.

The court found that the bond in suit was signed May 29,

1871; that it was, on the first day of June, handed by Hosmer to the deputy-assessor of internal revenue, to be transmitted to the assessor, by whom it was approved June 5, and then duly transmitted by mail to the collector of the district.

There was a judgment for $3,048.40, and costs.

Hart and Stahl then sued out this writ of error.

Mr. Chief Justice WAITE delivered the opinion of the court.

The second defense relied upon in this case is disposed of by Osborne v. United States, 19 Wall. 577, which we are not inclined to reconsider.

The third defense is equally bad. Under the law as it stood when this suit was commenced, no distilled spirits could be removed from a distillery warehouse before payment of the tax, 15 Stat. 130, sect. 15, without subjecting all those engaged in such a removal to heavy penalties, id. 140, sect. 36. An officer of the United States had no authority to dispense with this requirement of the law. If in violation of his duty he permitted such a removal, he subjected himself to punishment, but did not bind the government by his acts. The government is not responsible for the laches or the wrongful acts of its officers. Gibbons v. United States, 8 Wall. 268; United States v. Kirkpatrick, 9 Wheat. 720; United States v. Vanzandt, 11 id. 184; United States v. Nicholl, 12 id. 505; Jones et al. v. United States, 18 Wall. 662. Every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform their duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect. Here the surety was aware of the lien which the law gave as security for the payment of the tax. He also knew that, in order to retain this lien, the government must rely upon the diligence and honesty of its agents. If they performed their duties and preserved the security, it inured to his benefit as well as that of the government; but if by neglect or misconduct they lost it, the government did not come under obligations to make good the loss to him, or, what is the same thing, release him *pro tanto* from the obligation of his bond. As between himself and the government, he took the risk of the effect of official negligence

upon the security which the law provided for his protection against loss by reason of the liability he assumed.

There was no error in striking out that portion of the first defense which was objected to. It was not responsive to any allegation in the petition.

Judgment affirmed.

CHAPTER XVII.

DEFENSES AVAILABLE TO SURETY.

a. Generally any defense that will defeat an action against the principal debtor will be available to the surety.

BERND v. LYNES. 1899.

71 Conn. 733; 43 Atl. Rep. 189.

Case reserved from superior court, Fairfield county; Silas A. Robinson, Judge.

Action by Henry Bernd against Lucy W. Lynes, administratrix. An agreed statement of facts was submitted for the consideration and advice of the supreme court of errors. Judgment advised for defendant.

ANDREWS, C. J. The defendant is the administratrix on the estate of William F. Lacey, late of Danbury. The plaintiff presented to her for payment a certain written guaranty which he held, made by the said Lacey in his lifetime. She disallowed that claim, and this suit was then brought. The writing is this: "$600. Danbury, Ct., June 8th, 1869. One day after date I promise to pay to the order of William F. Lacey six hundred dollars, value received, with interest. Wm. G. Randall." Indorsed on the back: "For value received, I hereby guaranty the payment of the within note until paid. Wm. F. Lacey." At the time this note and guaranty were executed and delivered, there was a verbal agreement by all the parties that payment should not be required so long as Mr. Randall should pay the interest thereon each year as it became due. This he did each year up to and including the year 1882. In 1883 he paid nothing, nor has he paid anything at any time since. The plaintiff has had no communication regarding said note with Mr. Randall or Mr. Lacey since June 8, 1883. Mr. Lacey died March

30, 1896. The defendant insisted that the plaintiff's right to recover on the said guaranty was barred by the statute of limitations; and this is the only question in the case. It is admitted that the cause of action against the maker of the note is barred. Counsel for the plaintiff, in their brief, clearly and candidly state the question. They say: "It may be conceded that, had the guaranty not contained the words 'until paid,' the statute of limitations would operate as a bar to the present action." Stated in a little different words, the question is this: Does the cause of action against the guarantor continue after the statute of limitations has run against the principal debtor? The answer to this question depends upon the character of the contract of guaranty or suretyship; and the force of the words "until paid" to enlarge that contract. What the character of that contract is was discussed by this court in the very recent case of Eising v. Andrews, 66 Conn. 65, 33 Atl. 585. What we said in that case is applicable in this: "The rule is that a cause of action cannot exist against a surety, as such, unless a cause of action exists against the principal. Ordinarily, the liability of such a surety is measured precisely by the liability of the principal." Brandt Sur. § 125; Seaver v. Young, 16 Vt. 658; Boone Co. v. Jones, 54 Iowa 709, 2 N. W. 987, and 7 N. W. 155; Patterson's Appeal, 48 Pa. St. 345; McCabe v. Raney, 32 Ind. 309. The obligation of a surety is an obligation accessory to that of a principal debtor, and it is of the essence of this obligation that there should be a valid obligation of some principal. Thus, when one agrees to become responsible for another, the former incurs no obligation as surety if no valid claim ever arises against the principal. Chit. Cont. (11th Ed.) 788. If the principal is not holden, neither is the surety; for there can be no accessory if there is no principal. De Col. Guar. & Sur. (Am. Ed.) 39; Add. Cont. § 1111. The existence of a principal debtor is a condition precedent to the operation of the contract of a surety. Hazard v. Irwin, 18 Pick. 95; Swift v. Beers, 3 Denio, 70; Mt. Stephen v. Lakeman, L. R. 7 Q. B. 202; Mallet v. Bateman, L. R. 1 C. P. 163. This is only in accordance with the general law of contracts which prevents a contract from becoming operative unless and until all conditions precedent are fulfilled. Brandt Sur. § 214; Bank v. Kingsley, 2 Doug. (Mich.) 379. So too, in general, whatever discharges the principal debtor discharges the surety. The liability of a

surety, as such, on a claim which is good as against the principal, ceases as soon as the claim is extinguished against the principal. The nature of the undertaking of a surety is such that there can be no obligation on his part unless there is an obligation on the part of the principal. "It is correctly laid down in Chitty on Contracts that the contract of a surety is a collateral engagement for another, as distinguished from an original and direct agreement for the party's own act; and, as is stated in Theobold on Principal and Surety, * * * it is a corollary from the very definition of the contract of suretyship that, the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such a principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal there can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal. * * * It would be most unjust and incongruous to hold the surety liable where the principal is not bond." Storrs, J., in Ferry v. Burchard, 21 Conn. 603. The same general doctrine is held in many other cases in this state. Willey v. Paulk, 6 Conn. 74; De Forest v. Strong, 8 Conn. 522; Bull v. Allen, 19 Conn. 101; Glazier v. Douglass, 32 Conn. 393; Candee v. Skinner, 40 Conn. 464. The special claim in this case is that the words "until paid" operated to enlarge the ordinary contract of suretyship, so as to take this case out of the general rule. We do not think the words as here used can be given that effect. This case is the ordinary one of suretyship, and, when the cause of action has become barred by virtue of the statute of limitations, the cause of action against the guarantor also became barred. Judgment is advised for the defendant. The other judges concurred.

GUILD v. BUTLER. 1877.

122 Mass. 498; 23 Am. Rep. 378.

Contract upon a promissory note made by the defendant payable to Robert W. Dresser & Co. or order, and by them indorsed to the plaintiff.

At the trial in the Superior Court, before PITNAN, J., it ap-

peared that the note was made by the defendant for the accommodation of Dresser & Co., who at the same time gave him an agreement in writing that they would themselves pay the note at maturity; that the plaintiff did not know this when he took the note, but, after learning it, and after the commencement of this action, united with other creditors of Dresser & Co. in a petition in bankruptcy against Herman D. Bradt, the surviving partner of that firm, (Dresser, the other partner, having died,) and afterwards voted for and signed a resolution of composition under the provisions of the act of Congress of June 22, 1874, § 17, by which the plaintiff with the other creditors of Dresser & Co. agreed to take, in full settlement, twenty per cent of their claims, to be paid in three equal installments, in ten days, three months and six months from the acceptance of that resolution, which was approved by the court in bankruptcy and recorded.

The judge instructed the jury that, if the note sued on was an accommodation note, and the defendant, as between him and Dresser & Co. was but a surety, and the plaintiff knew that it was an accommodation note when he entered into the resolution would constitute a defense to this action. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

Gray, C. J. By the existing acts of Congress upon the subject of bankruptcy, a bankrupt's estate may be settled, and the bankrupt discharged, in either of three ways:

First. The estate may be administered in the ordinary manner by assignees appointed for the purpose, and a certificate of discharge be granted by the court, with the assent, in some cases, of a certain proportion of the creditors who have proved their claims. Any person liable as surety for the bankrupt may, upon paying the debt, even after the commencement of proceedings in bankruptcy, prove the debt, or stand in the place of the creditor if he has proved it; or, the debt not having been paid by him nor proved by the creditor, may prove it in the name of the creditor or otherwise. U. S. Rev. Sts. § 5070. Mace v. Wells, 7 How. 272; Hunt v. Taylor, 108 Mass. 508. But the surety's liability to the creditor is not affected by any certificate of discharge granted to the principal. U. S. Rev. Sts. § 5118. Flagg v. Tyler, 6 Mass. 33.

Second. The estate may be wound up and settled by trustees nominated by the creditors, upon a resolution passed at a

meeting for the purpose by three-fourths in value of the creditors whose claims have been proved, and confirmed by the court, and upon the signing and filing, by such proportion of the creditors, of a consent in writing that the estate shall be so settled; in which case such consent and the proceedings under it bind all creditors whose debts are provable, even if they have not signed the consent nor proved their debts; the trustees have the rights and powers of assignees; the winding up and settlement are deemed proceedings in bankruptcy; the court may summon and examine on oath the bankrupt and other persons, and compel the production of books and papers; and the bankrupt may obtain a certificate of discharge in the usual manner. U. S. Rev. Sts. § 5103.

Third. The creditors, at a meeting ordered by the court, either before or after an adjudication of bankruptcy, may resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due them from him. Such resolution, to be operative, must be passed by a majority in number of the creditors whose debts exceed fifty dollars in value, and by a majority in value of all the creditors, and must be confirmed by the signatures of the debtor, and of two-thirds in number and one-half in value of all his creditors. The debtor is required to attend at the meeting to answer inquiries, and to produce a statement of his assets and debts and of the names and addresses of his creditors. The resolution, with this statement, is to be presented to the court; and if the court, after notice and hearing, is satisfied that the resolution has been duly passed and is for the best interest of all concerned, the resolution is to be recorded and the statement filed, and the provisions of the composition shall be binding on all the creditors whose debts, names and addresses are shown on the statement, and may be enforced by the court on motion and reasonable notice, and regulated by rule of court, or may be set aside by the court for any sufficient cause, and proceedings in bankruptcy had according to law. U. S. St. June 22, 1874, § 17. This section, providing for a composition under the supervision of the court, is taken from and substantially follows 126 of the English bankrupt act of 1869, St. 32 and 33 Vict. c. 71. See Ex parte Jewett, 2 Lowell 393; Re Whipple, 2 Lowell 404.

It has been determined in England, by decisions of high authority and upon most satisfactory reasons, that a creditor,

by participating in either of three forms of proceeding, whether by assenting to a certificate of discharge, or by consenting to a resolution, either for a winding up through trustees, or for the acceptance of a composition proposed by the debtor, does not release or affect the liability of a surety. Browne v. Carr, 2 Russ. 600, 5 Mo. & P. 497 and 7 Bing. 508; Megrath v. Gray, L. R. 9 C. P. 216; Ellis v. Wilmot, L. R. 10 Ex. 10; Simpson v. Henning, L. R. 10 Q. B. 406; Ex parte Jacobs, L. R. 10 Ch. 211, overruling Wilson v. Lloyd, L. R. 16 Eq. 60.

The proceedings for a composition under the statute, depending for their validity and operation, not upon the act of the particular creditor, but upon the resolution passed by the requisite majority of all the creditors, binding alike on those who do and on those who do not concur in, (if their debts are included in the statement filed by the debtor,) and finally confirmed and established by the court upon a consideration of the general benefit of all concerned, differs wholly in nature and effect from a voluntary composition deed, which binds only those who execute it. Oakeley v. Pasheller, 4 Cl. & Fin. 207, S. C. 10 Bligh N. R. 548; Bailey v. Edwards, 4 B. & S. 761; Bateson v. Gosling, L. R. 7 C. P. 9; Oriental Financial Corporation v. Overend, L. R. 7 Ch. 142; Cragoe v. Jones, L. R. 8 Ex. 81; Gifford v. Allen, 3 Met. 255; Phoenix Cotton Manuf. Co. v. Fuller, 3 Allen 441.

Assuming, therefore, that this defendant, having signed the note for the accommodation of the indorsers, was to be considered as a surety for them, and that the plaintiff, after acquiring knowledge of that fact, stood as if he had known it when he took the note, yet no defense is shown to this action.

Exceptions sustained.

HOLM v. JAMIESON. 1898.

173 Ill. 295; 50 N. E. Rep. 702; 45 L. R. A. 846.

Error to appellate court, First district.

Action by John Holm against Egbert Jamieson and another upon the guaranty of the payment of a promissory note. From a judgment of the appellate court (69 Ill. App. 119) reversing a judgment in favor of plaintiff, he brings error. Reversed.

PHILLIPS, C. J. On May 16th, at Chicago, Ill., the Great Western Wire Works, by F. B. Filkins, treasurer, executed its note for $1,500, due 60 days after date payable to itself, with 6 per cent. per annum, interest after maturity, with power of confession of judgment, which note was indorsed: "Pay to the Central Trust and Savings Bank or order. Great Western Wire Works, by F. B. Filkins." This note came to the hands of John Holm, who brought suit on the guaranty indorsed thereon, which is as follows: "I hereby guaranty the prompt payment of the within note. E. A. Filkins. Egbert Jamieson." The declaration alleges that, upon the consideration that the Central Trust & Savings Bank would discount the note if the defendants would guaranty the prompt payment thereof, the defendants, for the consideration aforesaid, did guaranty the payment of the same to the Central Trust & Savings Bank. That bank, relying upon the guaranty of the defendants, discounted the note for the maker. After the guaranty of the note by Filkins and Jamieson, and its indorsement to the Central Trust & Savings Bank, that bank made a second indorsement thereon as follows: "Pay to John Holm or order. Central Trust and Savings Bank, by W. A. Paulsen." John Holm having brought suit on the guaranty indorsed on said note, against Egbert Jamieson, one of the guarantors, the latter appeared, and filed a plea of general issue and a special plea, in which it was set forth that William Holland, Merchant & Co. (a corporation), and other corporations and individuals filed their bill of complaint against the Great Western Wire Works, Sadie H. Filkins, Edward A. Filkins, John Holm, Charles B. Morrow, and Edward B. Filkins, in which it was averred that a note held by John Holm and numerous other notes similarly executed were fraudulent and void because of the fact that there was no authority in the treasurer to execute the same, and asking the cancellation of the judgment heretofore entered on said note of John Holm, and that said notes be declared fraudulent and void, and be canceled and surrendered, and that judgment entered upon the said notes so executed be vacated and annulled. A decree was entered on the hearing, in accordance with the prayer of the bill, and these facts by the special plea are averred. It is therein further averred that the contract of guaranty was written on paper on which said fraudulent and void promissory note was written, without any

other or different consideration than the consideration for the said promissory note, which promissory note was declared to be fraudulent and void, and decreed to be canceled, and the plea further averred that said decree was in full force. To this special plea a demurrer was interposed, and a stipulation entered into by the parties to the declaration, by which it was agreed that the said special plea of Jamieson should be adopted as the plea of Filkins, and that the plaintiff will stand by his demurrer to his special plea, and, if the demurrer is overruled, the judgment to go for the defendants, and that the defendants agree to stand by their special plea, and, if the demurrer thereto is sustained, the judgment shall be entered for the plaintiff, and the plea of general issue be withdrawn. The trial court sustained the demurrer to the special plea, and entered judgment for the plaintiff, to which exception was taken; and on appeal to the appellate court for the First district that judgment was reversed, and judgment entered in the appellate court for the defendants, from which this appeal is prosecuted.

It is insisted, first, by the appellant, that the decree set up in the plea by which the note on which the guaranty was indorsed, and which was the basis of this action, was not *res judicata* as to the defendant Jamieson, who was not a party thereto, and that that decree would be no bar to the prosecution of the suit on the guaranty indorsed on the note. The contention of appellee is that, as there is no debt or obligation due and owing to the appellant from the maker of the note, there is nothing due and owing to the plaintiff from the guarantors of the note; that as the maker of the note has been released and discharged by reason of the decree, and the guarantors have been deprived of their right of action over or subrogation as against the maker, there can be no liability as against the guarantors. The note of the Great Western Wire Works having been executed by one without authority to execute such a note, as found in the decree set up in the plea, by that decree the note was declared for that reason fraudulent and void. To the proceeding by which this decree was so entered, the appellant, John Holm, was a party, but the appellee Egbert Jamieson was not made a party thereto. We do not deem it necessary to enter into an extended discussion of the question as to the effect of the decree on parties and privies, and as to its being of no effect in binding persons who were not parties to the

proceeding. The material question in this case to be determined is: What is the effect of the contract entered into by the defendants in guarantying payment of the note in the language they did, and how is that guaranty affected by a decree declaring the note itself on which the guaranty was written, and the payment of which was so guarantied, void. The language used in this guaranty, "I hereby guaranty the prompt payment of the within note," by its terms fixed the time at which the payment was to be made as of the date of the maturity of the note; and if the payment is not made by the maker within the time fixed in the note, there is a breach of the guaranty on which a liability exists, regardless of the fact that no steps have been taken against the principal. A different rule exists when a defense is made to a note by reason of payment or a proper set-off. In such case a defense exists to the guarantor to the same extent as to the maker. A guarantor may make a contract which is collateral, or one which is independent. This guaranty was an absolute undertaking that the maker would pay the note when due, and by the default of the principal an immediate liability existed. The undertaking of the guarantor was an independent contract, not resting on a necessity to exhaust a remedy against the maker; but, by the terms used in the guaranty, it was an undertaking to every subsequent holder that the instrument guarantied was perfectly valid. By a guaranty of this character, the guarantor undertakes to every subsequent holder that the names of the maker and previous indorsers are really in the handwriting of those to whom they respectively purport to belong; and this is carried to the extent that, where a promise has been written upon the note itself, a person guarantying the payment of that note is bound, even though the names of prior parties, or some one of them, were in fact forged. Veazie v. Willis, 6 Gray 90. And it has been held that where a party to a certificate of deposit transferred it to another, who had no connection with, and was ignorant of the circumstances attending its origin, with the guaranty of the payment thereof, the guarantor was liable for the amount of the certificate, although it was void for matter *de hors* its face; and the court said the guaranty was, in effect, the representation that the instrument or claim was perfectly valid, as well as a promise to pay it. Purdy v. Peters, 35 Barb. 239.

Under the terms of this declaration, the guaranty of the pay-

ment of the note by the signers to that guaranty was a condition precedent to its purchase, by the Central Trust & Savings Bank, and it is further averred that its acceptance by that bank was because of its reliance on the guaranty. The contract thus made by the guarantors of the note was a promise as to its legality, and a liability which was not dependent on the prosecution of a suit against the maker of the note, nor dependent on the validity or legality of the note. If the liability of a guarantor of commercial paper were dependent on extraneous circumstances not appearing on or suggested by the face of the instrument, and such guaranty might be rendered invalid because of fraud, forgery, or other circumstances that might be set up as between the maker and the acceptor of the paper, it would practically destroy the value of commercial paper, and unsettle business transactions, to the great detriment of public interests. The guaranty is a contract by which the validity of the instrument is represented, and is binding on the guarantor to the full effect of such representation. Such being the case, the fact that the Western Wire Works, whose name was appended to the note, was placed there by the treasurer without authority, thereby rendering its execution, as against the maker, invalid, did not change the liability of the guarantor on his contract, because its effect—the effect of the contract of the guarantor—was to represent the note as valid and binding. Such liability existing by reason of the guaranty was not defeated because of the want of authority of the maker of the note to sign the name of the corporation. The decree entered declaring the note fraudulent and void because of the want of authority in the treasurer to sign the name of the corporation thereto did not constitute a defense in favor of the guarantors, and the plea was bad. The demurrer was properly sustained by the trial court. It was error in the appellate court to reverse the same. The judgment of the superior court of Cook county is affirmed, and that of the appellate court for the First district is reversed.

Judgment reversed.

CHAPTER XVIII.

EFFECT OF JUDGMENT AGAINST PRINCIPAL.

a. A judgment against the principal is not conclusive against the surety.

McCONNELL v. POOR. 1901.

113 Iowa 133; 84 N. W. 968; 52 L. R. A. 312.

Appeal by plaintiff from a judgment of the district court for Des Moines county in favor of defendant in an action brought upon a contractor's bond. Affirmed.

Statement by Ladd, J. Evans entered into a contract with plaintiff, July 14, 1891, to construct a dwelling house for him, and on the same day executed a bond with defendant as surety conditioned "that, if the said Evan F. Evans shall duly perform said contract, then this obligation is to be void, but, if otherwise, the same to be and remain in full force and virtue." The house was built and in 1892 Evans began an action against the plaintiff for a balance due. McConnell filed a cross petition in which he averred several breaches of the contract and prayed for damages. The result was a judgment against Evans for $943, to recover which this action was brought against the defendant as surety on the bond. By way of defense, he pleaded alterations in the contract in four particulars: (1) That the work was done under the direction of McConnell, instead of Sunderland, the architect, as agreed; (2) the broken ashlar work was constructed with close joints, instead of being tuck pointed, as stipulated; (3) the increased cost occasioned by this change was not estimated at the rate at which the work was taken, and added to the amount to be paid as exacted by the terms of the contract; and (4) other changes were made without estimating the increased cost, as required in the agreement. To these defenses the plaintiff pleaded adjudication in Evans against McConnell as an estoppel. The defendant also answered that he had advanced, in payment of labor and material, with McConnell's knowledge and consent, a large amount of money, and was released from liability on the bond to that extent. Trial to jury and from judgment on a verdict against him, the plaintiff appeals.

Ladd, J., delivered the opinion of the court:

How far will a surety on a bond be bound by a judgment against his principal alone? There is no little confusion in the language of the courts on this subject, and entire harmony does not prevail in the decisions. This has resulted sometimes in treating such a judgment as *res judicata* in an action against the surety, rather than passing on the character of the contract, and simply holding him to its performance. It is a fundamental principle in jurisprudence that every man shall have his day in court, and shall be heard in his own defense, and of this right he may not, under the constitution and laws of this state, be deprived. For this reason, judgment against the principal may never foreclose investigation of the surety's liability, unless by virtue of the latter's undertaking, he has obligated himself directly or by implication to be bound thereby. Where, by the terms of the bond, the surety is to be bound by the litigation to which he is not a party, the courts decide, not that the judgment is an adjudication, because of the connection, but that he must perform the contract as it is written. Shenandoah Nat. Bank v. Reed, 86 Ia. 136, 53 N. W. 96. The only ground on which sureties on official bonds generally may be regarded as bound by the judgments against their principals is that the sureties by the terms of the bond agree, expressly or impliedly, to abide the result of litigation against their principals. This principle is well stated in Stephens v. Shafer, 48 Wis. 54, 33 Am. Rep. 796, 3 N. W. 835. "The nature of the contract in official bonds is that of a bond of indemnity to those who may suffer damages by reason of the neglect, fraud, or misconduct of the officer." The bond is made with the full knowledge and understanding that, in many cases, such damages must be ascertained and liquidated by an action against the officer for whose acts the sureties make themselves liable, and the fair construction of the contract of the sureties is that they will pay all damages so ascertained and liquidated in an action against their principal. See also Masser v. Strickland, 17 Serg. & R. 354, 17 Am. Dec. 668. This court held in Charles v. Hoskins, 14 Ia. 471, 83 Am. Dec. 378, that judgment against a sheriff might be received in evidence as fixing, *prima facie*, the liability of the surety. True, other reasons for so holding than here suggested were assigned. But the doctrine of *stare decisis* has no application to the reasons given for reaching the conclusion; it is limited to the very point decided. The fallacy in the reason-

ing of that case, as well as Lowell v. Parker, 10 Met. 309, 43 Am. Dec. 436, on which it was based, lies in supposing that, because the surety may claim the benefit of a judgment in favor of his principal, it follows that he is concluded by one against him. But the surety is discharged by a finding for his principal, not owing to the creditor being estopped, but for that it establishes the absence of liability of the principal, and, if he is not liable, the surety cannot be, as his obligation is merely incidental to that of the principal. Besides, the discharge of the principal does not always release the surety. If the former be an infant when executing an instrument, and is discharged on that ground, the surety may yet be held. Keokuk County State Bank v. Hall, 106 Ia. 540, 76 N. W. 832. To the point is this language, found in Jackson v. Griswold, 4 Hill 528: "No doubt . . . a decision against the debt would discharge him (the surety). That, however, is not on the ground that he is a party, but because the judgment or decree extinguishes the debt; and, the principal thing being thus destroyed, the incident—the obligation of the surety—is destroyed with it. The effect is the same as a release by the creditor or a payment by the debtor."

It is sometimes urged that as the surety has become responsible for the debt or good conduct of the principal, judgment establishes the fact on which the surety's liability rests. A complete answer to this is that the fact has not been established against the surety, because he has been afforded no opportunity to litigate the question. Under the civil law, the surety was permitted to defend, and even allowed to prosecute an appeal from the judgment against the principal, though not a party to the judgment. As he was given his day in court, there appears no serious objection to binding him by the litigation. Much of the confusion in the decisions seems to have resulted from the attempt to apply the rule of the civil law binding the surety by the litigation against the principal, without allowing the former the participation there accorded. We have called attention to the inapplicability of the doctrine of estoppel in such cases, as the appellant, with much propriety, has insisted that, if applicable at all logically, it must extend to bonds in private transactions. The better opinion and the voice of authority is the other way, and a judgment against the principal is entitled to no consideration as against the surety, unless by the terms

of the contract the surety is to be bound thereby. Giltinan v. Strong, 64 Pa. 244; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Arrington v. Porter, 47 Ala. 714; Douglass v. Howland, 24 Wend. 35; De Greiff v. Wilson, 30 N. J. Eq. 437; Firemen's Ins. Co. v. McMillan, 29 Ala. 147; Jackson v. Griswold, 4 Hill. 523; 2 Van Fleet, Former Adjudication, § 567; 2 Black Judgm., § 592.

In Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98, the court, speaking through Redfield, J., said: "The general rule undoubtedly is that, in a collateral undertaking by way of guaranty, where a suit is necessary to fix the liability of the guarantor, the first judgment is *prima facie* evidence of the default. But, where the guarantor is liable without suit against the principal, the judgment against him is regarded as strictly matter *inter alios.* The judgment of eviction, in order to show a breach of the covenants of warranty, is a case of the first class. The judgment of eviction is a necessary step in making out the liability of the warrantor; that is, the *casus foederis.* So, too, generally, I apprehend, when anyone undertakes to indemnify himself against the consequences of a suit, or that a suit brought shall be effectual, the judgment in either case, being the *casus foederis,* is *prima facie* evidence of the liability. And, on the other hand, where the suit may, in the first instance, be brought directly against the guarantor, the judgment against the principal, without notice to the guarantor, is not evidence; and so, too, if the guarantor have notice of suit against the principal, he is not obliged to concern himself in its defense, but may await a suit against himself and then insist upon the right to contest the whole ground."

The defendant in the case at bar was not a party to the contract, nor could he have insisted on being made a party to the action between Evans and McConnell thereon. The latter might have brought suit against both principal and surety on the bond, but he chose, as was his right, to base his action on the contract alone. Even if these might have been regarded, for some purposes, as one instrument, the appellant elected to treat them as distinct and separate by basing his suit against Evans solely on the contract, and that against Poor on the bond. The surety may require the principal to defend, for this is his duty; but the surety owes no such duty to the principal, and is under no obligations to defend him. Poor was not a party to the action

on the contract, for he could neither appear and control the suit nor appeal from the decree. Nor was he privy to that action. Privity, says Greenleaf, denotes mutual or successive relationship to the same right of property. Privity in law involves the right of representation, and certainly the principal, in an action against himself alone, may not represent the surety. As was said in Giltinan v. Strong, 64 Pa. 244: "The privity of the surety with his principal is in the contract alone, and not in the action." For the acts or omissions of the principal to which the surety pledges himself in his contract he is bound, and it is only in this respect the principal represents the surety. This is the criterion of the competency of the principal's declarations and admissions. Where these form a part of the acts or omissions of the principal for which the surety is bound, they constitute portions of the *res gestae,* and may be evidence against the surety. But beyond this line clearly the surety cannot be affected by the acts or admissions of his principal, for he is not represented by him. True, Poor was the attorney for Evans in the suit on the contract, contested it with zeal and persistency, and was charged with notice thereof. See Evans v. McConnell, 99 Iowa 332, 53 N. W. 570, 68 N. W. 790. But as surety he could make no defense to the action on the contract. His client might have revoked his authority at any moment. He could have gone further, and dismissed the action, or, rather, withdrawn his defense to the cross petition, without consulting the surety. See Jackson v. Griswold, 4 Hill 528. For the reasons stated we are of opinion the district court did not err in holding the defendant not bound by the findings against his principal in the former action.

2. The appellant insists the contract permitted changes, and this is true. But the manner of making them is specifically pointed out. "The value of such changes or alterations, without additions or deductions, will be estimated according to the rate at which the work has been taken, and the amount added to or deducted from the amount hereinafter specified." This precluded the parties from entering into arrangements for additional work, or that of a different character, without compensation corresponding relatively to the contract price. If this were not so, an entirely different building from that stipulated might have been erected at the surety's cost. Thus, the alleged change in the broken ashlar work alone occasioned an additional ex-

pense of $1,600 or more,—more than the balance claimed. While the plaintiff had the option of making alterations, he might not do so without paying therefor at the rate fixed by the contract.

The evidence was in conflict on every issue submitted to the jury, and sufficient to support the verdict. The instructions in the respects criticised were clear and accurate, and included those requested, in so far as correctly stating the law.

Affirmed.

BARKER v. WHEELER. 1900.

60 Neb. 470; 83 N. W. Rep. 678; 83 Am. St. Rep. 541.

Error to the district court for Douglas county. Tried below before Scott, J. Affirmed upon filing of remittitur.

SULLIVAN, J. This proceeding in error brings here for review a judgment of the district court in favor of Bert Glendore Wheeler, a minor, and against George F. Barker and William S. Rector. The action was instituted by Miss Wheeler's guardian to recover of the defendants, as sureties upon the official bond of James W. Eller, a sum of money which, it is alleged, Eller received in trust for the plaintiff, and converted to his own use while acting as judge of the county court of Douglas county. After stating that the money in question was paid into court by the administrator of the estate of Bert B. Wheeler, deceased, in pursuance of an order of the court, and that such money belonged to the plaintiff, and was received by Eller as county judge, the petition charges "that said Eller wrongfully, fraudulently and corruptly and in gross violation of his duties as such county judge, after having obtained possession of said funds as aforesaid, thereafter converted said sum of $1,935.92, the amount belonging to this plaintiff, to his own use, and that ever since said date, said Eller has retained all of said last mentioned sum, save $485.92, though payment thereof has been frequently demanded by plaintiff's guardian." The defendants answered, admitting that the plaintiff was an infant; that Eller was county judge of Douglas county during 1892 and 1893, and that they were sureties upon his official bond. The other averments of the petition were denied in general terms.

The first contention of defendants is that the money which

Eller was charged with having converted to his own use was not received by him in his official capacity, and that, therefore, the misappropriation of it did not constitute a breach of his official bond. This precise question has been already considered and decided by this court in this case. By the former decision it is settled, so far as this litigation is concerned, that "where a county judge orders an administrator to pay money into court and the latter does so and the county judge receives the money, it is, on his part, an official act and he is liable therefor upon his official bond." Wheeler v. Barker, 51 Nebr. 846. The doctrine thus declared appears to be sound. At any rate it is the law of the case and will not be re-examined at this time. Ripp v. Hale, 45 Nebr. 567; Coburn v. Watson, 48 Nebr. 257; Omaha Life Ass'n v. Kettenback, 55 Nebr. 330; Hayden v. Frederickson, 59 Nebr. 141; Home Fire Ins. Co. v. Johansen, 59 Nebr. 349.

To show that Eller had converted the plaintiff's money, there was produced at the trial and received in evidence the record of a decree rendered by the district court of Douglas county in an action brought by the plaintiff against Eller alone. The sureties contend that the judgment against their principal is not admissible against them and does not tend to establish their liability, while the guardian insists that it is not only competent, but indisputable proof. We think the record was sufficiently identified; that it was properly received and that it constituted *prima facie* evidence of the alleged conversion. In Fire Association of Philadelphia v. Ruby, 49 Nebr. 584, it was held that a judgment of amercement against an officer is *prima facie* evidence against his sureties when sued upon their bond. This decision seems to be supported by the preponderance of adjudged cases and it will be adhered to. Graves v. Bulkley, 25 Kan. 249; Fay v. Edmiston, 25 Kan. 439; Lipscomb v. Potsell, 38 Miss. 476; Charles v. Hoskins, 14 Ia. 471; Stephens v. Shafer, 48 Wis. 54; Beauchaine v. McKinnon, 55 Minn. 318; Norris v. Mersereau, 74 Mich. 687. Thomas v. Markmann, 43 Nebr. 823, and Lewis v. Mills, 47 Nebr. 910, holding that such a judgment is conclusive upon the sureties, appear to be, in part at least, based upon Pasewalk v. Bollmann, 29 Nebr. 519, which merely decides that a surety who agrees to pay any judgment that may be recovered against his principal must, in the absence of fraud or collusion, abide by his contract. That the court in the last mentioned case clearly recognized the distinction between agree-

ments of sureties to be bound by judgment against their principles and general undertakings to answer for official misconduct is shown by the following statement in the opinion: "In the case of most official bonds the sureties do not promise to pay any judgment rendered against the principal, hence a judgment against the official on such a bond is not conclusive upon the sureties where the latter had no notice of the suit." The defendants in the present case did not agree to satisfy any judgment that might be recovered against their principal. Their undertaking was, in general terms, that he would perform his official duty. Upon the question of whether he had been guilty of misconduct in office, they were entitled to be heard. It is contrary to natural justice that they should be concluded by a judgment to which they were not parties, and by which they did not agree to be bound. While Thomas v. Markmann, *supra*, and Lewis v. Mills, *supra*, are not without the support of respectable authority, we are of opinion that they extend the liability of the surety beyond the terms of his agreement and disregard entirely the strict rule of construction applicable to such contracts. To the extent that those cases are in conflict with Fire Association of Philadelphia v. Ruby, *supra*, they are overruled.

A further contention of defendants is that the evidence given at the trial does not establish a breach of the condition of the bond in suit. We think it does. The petition alleged that Eller, as county judge, received the plaintiff's money, and afterwards converted it to his own use. The answer merely denied this charge; it did not plead payment or accord and satisfaction. If Eller received the money and misappropriated it during his term of office, or failed to turn it over to the proper person at the close of his term, he was guilty of official misconduct. The decree in the case brought by the plaintiff against Eller alone was rendered on December 18, 1897, and is based in part upon the following findings:

"2. That on the 29th day of March, 1892, said defendant while acting as judge of said court and as such court and judge thereof, obtained possession of the sum of $1,935.19 belonging to plaintiff, said money being inherited by plaintiff from her deceased father, Bert G. Wheeler, whose estate was then in process of settlement in said county court.

That of said money the sum of $1,450, defendant ever since

said last mentioned date, has failed, neglected and refused to pay to the guardian or plaintiff, or any part thereof."

These findings show that Eller received the plaintiff's money by virtue of his office, and that he retained the greater portion of it after he ceased to be county judge. According to these findings, Eller must have been guilty of conversion on or before January 3, 1894. It was lawful for him, as judge of the county court, to receive the money, but it was not lawful for him to retain it after the expiration of his official term. The evidence on the part of the plaintiff conclusively established a conversion, and, the defendants having failed to plead or prove anything in avoidance, the only controverted question was the amount of their liability. While there is evidence in the record tending to prove that Eller obtained the plaintiff's money with intent to cheat and defraud her, it is not certain that he actually appropriated any part of such money to his own use before the end of his term. The defendant offered to show that there was no default on the part of their principal prior to January 4, 1894, but the trial court rejected the evidence on the theory that the decree against Eller fixed indisputably the liability of his sureties and the extent of such liability. The proffered evidence should have been received; it was error to exclude it. Notwithstanding this error, the plaintiff was entitled on May 11, 1899, the day the verdict was returned, to a judgment for $1,985.13; and the judgment for that amount with interest will be affirmed if there be a remission of the excess within sixty days. In case the plaintiff does not file a remittitur for such excess with the clerk of this court within the time aforesaid, the judgment will be reversed.

Judgment accordingly.

CHAPTER XIX.

CONSTRUCTION CONTRACTS.

a. Third persons for whose benefit a construction bond is given can recover thereon though a stranger to it.

GRIFFITH v. RUNDLE. 1900.

23 Wash. 453; 55 L. R. A. 381; 63 P. 199.

Appeal by defendants from a judgment of the Superior Court for Spokane county in favor of plaintiffs in an action brought to hold sureties on a contractor's bond liable for unpaid labor and materials which went into the construction of the building. Affirmed.

The facts are stated in the opinion.

REAVIS, J., delivered the opinion of the court:

In July, 1897, defendant Rundle entered into a contract with the United States for the construction of certain buildings at the army post near Spokane. At the time the contract was executed, a bond was duly executed in accordance with the provisions of the act of Congress approved August 13, 1894 (28 Stat. at L. p. 278, chap. 280). The law is entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works." Its provisions are substantially that any person entering into a formal contract with the United States for the construction of any public building shall be required, before commencing, to execute the usual penal bond with good and sufficient sureties, with the additional obligations that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work provided for in the contract; that any persons performing labor or furnishing materials for such work shall be furnished on application with a certified copy of the contract and bond upon which the person supplying labor and materials shall have a right of action, and be authorized to bring suit in the name of the United States against the contractor and sureties, provided that such action shall involve the United States in no expense. The defendants Henley and Snodgrass were sureties upon the bond, the penal sum of which was $10,000. While the contractor, Rundle, was engaged in the construction of the buildings under his contract, materials were furnished by plaintiffs to the contractor, and used by him in the work of construc-

tion. Subsequently, and while the buildings were but partially completed, the United States, in the exercise of the right reserved in the contract, took the work out of the hands of Rundle, and at the same time notified the sureties, Henley and Snodgrass, of its action. Thereupon the sureties took up the work of construction, and completed the buildings according to Rundle's contract, and the United States accepted their work as full performance of the contract. For defense to the action, after some denials, the sureties set up the fact that Rundle did not complete the contract, but the sureties, under its terms, made full performance, which was duly accepted by the United States, and that in their completion of the contract they were necessarily compelled to expend sums in excess of $10,000, the amount of the penalty in the bond.

I. The several assignments of error made by the appellants may be grouped together, and stated as the refusal of the superior court to admit testimony under the affirmative defense set forth in the answer. The court excluded any evidence with reference to the United States having demanded of the sureties the performance of the contract or the payment of damages. It is maintained by counsel for appellants that the limit of the liability of the sureties was the penalty stated in the bond, $10,000; that, if the sureties had not undertaken the performance of the contract of their principal, the entire damages to both the government and the respondents and all of the other claimants for labor and materials would have been liquidated by the payment of $10,000; that the fact that the sureties necessarily expended more than that sum in the completion of the contract, and over the contract price, relieves them from further liability. It is also maintained that, if the contract had not been completed, the government is a preferred creditor, and its claim would exhaust the penalty, and there would be no funds left for the satisfaction of plaintiffs and other claimants of like character; and counsel maintain that it is necessary to determine the question of priority of rights as between the government and these claimants. In a case involving these facts,—United States use of Fidelity Nat. Bank v. Rundle,—in the United States circuit court, judgment was entered in conformity with the contention of counsel here. But the cause was afterwards reversed by the United States circuit court of appeals (40 C. C. A. 450, 100 Fed. 400), and the appellate court observed:

"The undisputed facts of the present case are such that it is not necessary to consider the question presented in the court below, and argued here, whether if the United States had any cause of action upon the bond in suit, its claim should be preferred to that of the laborers and material men; for, as has already been observed, the United States received full performance of the contract, and therefore has no cause of complaint." In the case of United States use of Anniston Pipe & Foundry Co. v. National Surety Co., 34 C. C. A. 526, 92 Fed. 549, such a bond was under consideration by the court, and it was there adjudged that the bond was intended to perform a double function: First, to secure the faithful performance of the contract to the government; and, second, to protect third persons from whom the contractor might obtain labor or materials in the prosecution of the work. In its second aspect, the bond, by virtue of the statute, contains a separate and distinct agreement between the obligors and such third persons as to which the agency of the government ceases when the bond is given and approved, and subsequent changes in the contract, agreed upon between the government and the contractor, though without the knowledge or consent of the surety, will not release the surety from liability to persons who supply labor or materials thereunder. The court observed of the statute under which the bond is executed: "It is also noticeable that in its title the act professes to be one for the benefit of persons furnishing materials and labor, and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be 'the usual penal bond;' meaning, evidently, such an obligation for the government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, Congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials, so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons

having contracts with the government. . . . Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains—the one for the benefit of the government, and the one for the benefit of third persons—are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience." In the case of Dewey v. State ex rel. McCollum, 91 Ind. 173, it was substantially held that for any breach of the second condition of such a bond by the contractor the right of action was in the laborer or the material man, and that such right of action could not be defeated or abridged by any act done by the obligee in the bond after the bond had been taken and approved; and it was ruled that changes made in the contract by the parties thereto—that is, the contractor and the public authorities—after the bonds had been accepted would not deprive material men of their rights to recover against sureties in the bond. To the same effect is Conn v. State ex rel. Stutsman, 125 Ind. 514, 25 N. E. 443, and the same principle is affirmed in Doll v. Crume, 41 Neb. 655, 59 N. W. 806; Kaufman v. Cooper, 46 Neb. 644, 65 N. W. 796; Steffes v. Lemke, 40 Minn. 27, 41 N. W. 302. The practical effect of the statute, and others of similar character in a number of the states, seems to be to confer a special lien in favor of such persons who furnish labor and material, and to substitute the bond in place of the public building as a thing upon which the lien is to be charged. Such liens evidently appear, from an inspection of the current legislation, to be favored, and the courts have usually adopted a liberal rule of construction in their enforcement.

2. It is pertinent to suggest that in the performance of the unfinished contract by the sureties, if they had expended less than the amount to be paid by the government on the completion of the contract, the excess or profit would have belonged to them, and if they undertook the completion of the contract and sustained a loss, it would seem that it should fall on them. As sureties under the terms of the contract, they might elect to complete it upon default of their principal, but such completion was not the full performance of the contract by the principal him-

self. It satisfied the sureties' contract with the government, but, as observed by the circuit court of appeals in United States use of Fidelity Nat. Bank v. Rundle, 40 C. C. A. 450, 100 Fed. 400, the United States is not a claimant here, and the question of priority of claims to the amount due from the sureties under the terms of the bond is not involved in this case.

The judgment of the Superior Court must be affirmed.

DUNBAR, Ch. J., and FULLERTON and ANDERS, JJ., concur.

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b. A surety cannot, upon discovery that the principal has fraudulently procured him to sign his bond, escape liability by notifying the obligee.

A. S. RIPLEY BUILDING CO. v. COORS. 1906.

— Col. —; 84 Pac. Rep. 817.

Appeal from District Court, Arapahoe county; P. L. Palmer, Judge.

Action by Adolph Coors against the A. S. Ripley Building Company and the American Surety Company. Judgment for plaintiff. Defendants appeal. Affirmed.

MAXWELL, J. The appellant building company contracted with appellee to do the carpenter and joiner work upon a building which appellee proposed to erect, according to the terms and specifications of a contract in writing. For the faithful performance of the terms, conditions and specifications of the contract by the building company, appellant surety company executed a bond to appellee in the sum of $4,000, the conditions of which bond are as follows: "Now, if the said bounden A. S. Ripley Building Company shall faithfully construct such work in strict accordance with and in all things perform the said contract without delay and save the said Adolph Coors, his heirs and assigns, harmless from mechanics' liens or damage of any and every kind, by reason of the construction of said work, then the above obligation to be null and void, otherwise to be and remain in full force and effect." This suit was to recover damages for a breach of the conditions of the bond.

To the complaint the surety company interposed four defenses.

The second and third defenses are those relied upon for a reversal of the judgment rendered by the court below. In substance, the second defense is that at the time the surety company executed and delivered the bond in suit, the building company induced the surety company to execute the bond upon representations that the president of the building company, with others, would indemnify the surety company against loss or damage by reason of the execution of such bond by the surety company, and that its president was the owner of real estate in the city of Denver of the value of $25,000; that relying upon such representation the surety company executed the bond; that such representations were false and untrue, and known to be such by the building company and its president, at the time they were made; that the surety company discovered that such representations were false and untrue on or before the 14th day of November, 1899, and immediately notified appellee that the bond had been obtained by false representations, and demanded the release and delivery of the same, and also notified appellee that it would not be responsible for any damages arising to appellee by reason of the nonfulfillment of the conditions of the contract; that such notice was served on appellee on the 14th day of November, 1899, before anything was done under the contract and before appellee was in anywise damnified. In substance, the third defense is that appellee did not file in the office of the county clerk and recorder of the county of Arapahoe where the property is situated, the contract or memorandum thereof, required by the statutes of this state (3 Mills' Ann. St. Rev. Supp., § 2867), and that by reason of such failure, appellee became liable as an original contractor; that the material man's lien which was filed was for material furnished, not by the building company, but by appellee as an original purchaser; that such lien was not created by reason of the violation of any of the terms of the contract, and did not grow out of the contract.

The reply admitted the service of the notice alleged in the second defense, and denied all the other allegations thereof. It also admitted failure upon the part of appellee to file the contract, or a memorandum thereof, in the office of the clerk, and recorder as alleged in the third defense, denying all the other allegations of such defense. Upon the trial, which was to the court without a jury, the surety company, by a witness then on the stand, offered to prove that at the time of the application

for the execution of the bond Mr. Ripley, as president of the building company, offered to furnish the surety company, as indemnitors, himself and others; that Mr. Ripley represented himself as the owner of real estate worth about $25,000; that relying upon this representation the surety company executed the bond; that upon investigation it was found that the representations of Mr. Ripley were false and untrue; that he was the owner of no real estate whatever; that on the 14th day of November a written notice was served upon appellee that the surety company withdrew from the bond, and would no longer be bound thereby, which notice was served upon appellee November 14, 1899; that at the date such notice was served nothing had been done under the contract. Upon objection the offer of this testimony was refused. This ruling of the court is assigned as error.

Counsel for appellant surety company concedes the rule to be as stated by Brandt in his work on Suretyship and Guaranty, § 406. "If the principal, by fraud, induces the surety to become bound, but the obligee has no notice thereof, such fraud will, as a general rule, be no defense to the surety." The argument is that it is apparent from the rule as above stated, that if the obligee does have notice of the fraud of the principal, it would be a perfect defense, and that inasmuch as the obligee was notified of the alleged fraud perpetrated upon the surety company by the principal, before anything had been done under the contract, therefore, the appellee in this case comes within the rule as above stated. No authorities are cited in support of the position of appellant upon this point, and counsel very frankly admit that they have been unable to find any. A number of cases are cited and discussed, which by analogy, it is claimed, should rule this point favorably to the position taken by the surety company. It will be necessary to review these authorities. The weakness of the argument, and the fallacy of the conclusion arrived at by counsel, is due to the fact that the facts in the cases cited, clearly distinguish them from the case at bar.

The whole argument is based upon the proposition that nothing was done under the contract. The record discloses that the bond and contract were executed by all parties on the 30th day of October; the notice relied upon was served on the 14th day of November following, upon which date appellee had bound

himself by a written contract to the payment of the sum of $6,750 upon the performance by the building company of the terms of that contract. The cancellation by him at this time of such contract would have made him liable to a claim and an action for damages by the building company for the breach of his contract, the seriousness of which, in all probability, would only have been established at the termination of protracted and expensive litigation. Sureties should not be allowed to relieve themselves of liability imposed upon them by their voluntary contracts, by a mere notice to the obligee, that they were induced to enter into such contracts relying upon false statements made to them by the principal, of which statements the obligee was entirely ignorant, unless there be a stipulation in the contract of indemnity to such effect. The rule is thus stated in 27 A. & E. Ency. of Law, § 447: "A surety who has signed a contract of suretyship cannot ordinarily and before the breach of the contract by giving notice terminate his suretyship or escape future liability for his principal unless a stipulation to that effect appears in the contract"—citing cases. A number of cases are cited by counsel for appellant, to the effect that a surety or guarantor, upon a continuing contract of suretyship or guaranty, may, upon reasonable notice in writing, terminate all future liability arising under the contract. These cases are easily distinguishable from the case under consideration, in that here the contract was not a continuing contract. It is our conclusion that the court did not err in refusing to admit the testimony offered.

The third defense proceeds upon the theory that the only breach of the condition of the bond alleged by appellee and relied upon for a recovery, was the filing of a lien against the property of appellee. We do not so read the complaint. The complaint alleges, in substance, that the building company, in violation of its contract, did not furnish all the materials and fully and faithfully execute the work mentioned and referred to in the contract for the sum of $6,750, the sum provided for in the contract in this, viz., that the building company caused to be furnished by the Hallack & Howard Lumber Company a large amount of material to be used, and which was used by the building company in the construction of said building under its contract, which should have been furnished and paid for by the building company, but which the building company

neglected and refused to do; that the lumber company caused a lien to be filed on the lots and buildings of plaintiff, of which the surety company had due and timely notice; that thereafter the lumber company commenced its suit to establish and enforce its lien, of which the surety company had due and timely notice; that thereafter judgment was rendered against the building company, and establishing a lien against the property of plaintiff, for the sum of $1,719.68, which amount with interest, plaintiff has been compelled to and has paid.

The bond sued on, by its express terms refers to the contract and the two instruments should therefore be construed together, to determine the liability of the surety company. The contract, in substance, provides that the building company, at its own costs and charges, is to provide all materials of every description needful for the due performance of the contract, for which the building company is to receive the sum of $6,750. The conditions of the bond are that the building company shall faithfully construct the work in strict accordance with the contract, and save the obligee harmless from damage of any and every kind. Construction of the work specified in the contract, at an expense to the owner of over $1,700 in excess of the contract price, is certainly a violation of the terms of the contract, and therefore a breach of the conditions of the bond above stated, for which breach an action will lie. No argument or citation of authorities is necessary to support this position. In our view the third defense relied upon by appellant did not state a defense to the cause of action alleged, and no error was committed by the court in so ruling.

It is said that the statute relied upon in this defense (3 Mills' Ann. St. Rev. Supp., § 2867) provides that, if the owner fails to file the contract or a memorandum thereof as therein provided, materials furnished by all persons shall be deemed to have been furnished at the personal instance of the owner and the persons furnishing such materials shall have a lien for the value thereof; that the surety company had a right to expect that the appellee would do his full duty to protect his property from liens; that not having done so he cannot look to the surety company for indemnity for failing to do that which he should have done. The statute is to the effect stated, but it does not follow that the conclusion stated by counsel is the rule to be applied in this case, under the allegations of the complaint here-

in. Under a complaint which alleged as the sole breach of the condition of the bond, the filing of a mechanic's lien, there would be force in the argument of counsel, but that is not this case, and we express no opinion upon this proposition.

In the fullings relied upon for a reversal, there was no error, and the judgment will be affirmed.

Affirmed.

The CHIEF JUSTICE and GUNTER, J., concur.

CHAPTER XX.

EMPLOYERS' LIABILITY BONDS.

a. Employers' Liability Bonds are construed as insurance policies.

CASHMAN v. LONDON GUARANTEE & ACCIDENT CO. 1905.

187 Mass. 188; 72 N. E. Rep. 957.

KNOWLTON, C. J. This case was submitted upon an agreed statement of facts and evidence, in which it was stipulated that if the defendant is entitled, as matter of law, to a judgment in its favor on the facts and evidence, judgment is to be so entered; otherwise judgment is to be entered for the plaintiff in a stated sum. Judgment having been entered for the plaintiff, the defendant appealed, and the question before us is whether there is anything in the facts and evidence to warrant a finding for the plaintiff.

The action is to recover upon a policy of insurance "against loss from common law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any employee or employees of the assured, while on duty at the places and in the occupations mentioned in the schedule hereinafter given, and during the continuance of the work described in said schedule." The occupation of the plaintiffs mentioned in the schedule was that of stevedores and contractors. One of their employees, working as a stevedore, accidentally suffered an injury which quickly caused his death after conscious suffering. A suit was brought

against the plaintiffs, which was defended by this defendant, and a judgment was recovered, which these plaintiffs were obliged to pay. See Garant v. Cashman, 183 Mass. 13, 66 N. E. 599. The evidence in that case is a part of the agreed statement in this, and it shows that there was a liability of the plaintiffs for an accidental injury to one of their employees engaged in the business of a stevedore. On its face, the liability seems plainly to come within the terms of the policy, and to warrant a recovery in this action.

The ground of the liability of these plaintiffs in the former suit was a defect in their ways, works, and machinery provided for the use of their employees, a part of which was a runway, with an apron or platform attached to it by hinges, which when in use was lowered to a level with the runway, and held in place over the vessel that was being loaded, by hinges and chains. Along each side of the apron were posts and a rope, intended for the protection of the persons working upon it. One of these posts was found to be defective, and this defect was the cause of the injury to the plaintiff in the former suit. The present plaintiffs had entered into a contract with the coal company that owned the runway to keep it in repair so long as they conducted the business of unloading coal at that place. Their liability for the accident may have been founded on this contract, made in connection with their business as stevedores; and the defense in this suit is that such a contract, creating such a liability to employees, was so foreign to the business of stevedores as to take the liability out of the provisions of the policy of insurance.

In the first place, on the evidence, it may be doubtful whether, as matter of law, this runway was not a part of the ways, works, and machinery of the present plaintiffs, furnished to employees for their use in the business, such as to create a liability to them for its condition in the absence of such a contract to keep it in repair, and notwithstanding the ownership of the coal company. See Coffee v. New York, New Haven & Hartford Railroad Co., 155 Mass. 21-23, 28 N. E. 1128; Trask v. Old Colony Railroad Co., 156 Mass. 298-303, 31 N. E. 6; Hayes v. Philadelphia Coal Co., 150 Mass. 457, 23 N. E. 225; Spaulding v. Flynt Granite Co., 159 Mass. 587, 34 N. E. 1134. But if there would have been no liability to employees without the contract which made the present plaintiffs primarily responsible for the condition of the

runway, there is nothing in the evidence to show that such a contract might not properly be made in connection with the plaintiffs' business as stevedores. It seems to us incidental to the business in which they were engaged. They were, and had been for a number of years, under a contract to unload the coal coming to the coal company at this wharf. Certainly it cannot be said, as matter of law, that such a contract was so improper or unreasonable as to take their liability to their employees, on account of it, out of the general provisions of the policy. To have that effect, a contract must be such as to make the liability not the liability of a stevedore, within the meaning of the policy, but a separate and independent liability.

Judgment affirmed.

SOUTHERN RY. NEWS CO. v. FIDELITY & CASUALTY CO. 1904.

26 Ky. Law Rep. 1217; 83 S. W. Rep. 620.

O'Rear, J. The appellant, the Southern Railway News Company, is a corporation engaged in the sale and supplying of books, newspapers, periodicals, refreshments, and other articles and goods on railways, stages, steamboats, and other conveyances in the United States, and along the lines or ways of same. The appellee, the Fidelity & Casualty Company of New York, is a corporation engaged in the issuing of policies of insurance, insuring employers against liability for injuries to persons in their employment.

On February 11, 1890, appellee issued to appellant an employer's liability insurance policy, in consideration of $150 premium, insuring the news company for one year against injuries to its employees, for which it might become liable in damages, subject to the limitation that its liability should not be more than $5,000 in respect to an accident which would cause the death or injury of any one person. If any legal proceedings should be taken against the insured to enforce a claim for indemnity for such injuries, the insurer engaged at its own cost and expense to have the absolute conduct and control of defending the same throughout in the name and on behalf of the

insured; but, if the insurer should offer to pay the insured the full amount insured, then it should not be bound to defend the case, nor be bound for any costs and expenses which the insured might incur in defending it. It is also agreed that, upon the occurrence of an accident in respect of which a claim might arise, notice thereof should be immediately given to the insurer at its office in New York, and appellant should furnish full information in relation to it. The period covered by the policy, it was agreed, was fixed on the assumption that the amount of the estimated yearly pay roll to the employees of the insured would not exceed $30,000, and the premium paid was based on that amount. "Therefore as soon as the said amount of wages shall have been paid, this policy shall terminate as if the said period had expired, unless it shall have been continued for a further period by the payment and acceptance of a further premium in respect thereof." The insurer's officers were granted the right at any reasonable hour to inspect the books of the insured, so far as they related to the wages paid to its employees. The seventh clause of the agreement reads thus: "The company shall not be liable to a suit in any court for the recovery of a claim under this policy, unless the same is commenced within two years after the accident, which is the cause of action, has occurred."

On December 28, 1889, about two months previous to the date of the above-named policy, appellant entered into a written contract with the Kansas City, Memphis & Birmingham Railroad Company, by which the railroad company, in consideration of a stipulated sum, granted to the news company the privilege of selling upon its regular passenger trains during the year beginning January, 1890, periodicals, newspapers, books, etc., under certain conditions and regulations therein set out, including the following: "In consideration of the foregoing grant and the privileges therein specified, said news company releases said railroad company from any right of action, claim, or demand which may accrue to it by reason of the loss of any of its property while being transmitted on any of the trains of the railroad company under the terms of the contract, and further agrees, for such consideration, to indemnify said railroad company and save it harmless from all claims, demands, damages, actions, costs, and charges to which the railroad company may be subject, or which it may have to pay, by reason of any injury to any person

or property, or loss of life or property, suffered or sustained by any agent or employee of the news company while in, upon, or about any of the stations, platforms, cars, or other premises of the railroad company, whether such injuries or loss arise from the negligence of the employees of said railroad company, or otherwise."

Under that contract the railroad company carried the news company's agents upon its trains, including one George W. Davis, who in the course of his employment as news agent of appellant, on October 21, 1890, at the company's station at Birmingham, Ala., sustained a fatal injury from one of its trains, and he lingered some weeks before he died. Appellant promptly notified appellee of the fact, and called upon it to take such steps as it deemed proper under the policy to protect itself. The administrator sued the railroad company in a court of Alabama having jurisdiction of the matter, and recovered a verdict and judgment for $5,000 and his costs, which the railroad company paid. Neither appellee nor appellant defended that suit. The railroad company on October 14, 1891, demanded payment of the news company of the $5,000 and the further sum of $528.85, which the railroad company had paid for hospital expenses, and doctor's services rendered to Davis. The news company failing to pay, the railroad company sued it in the circuit court of Jackson county, in the state of Missouri, which suit resulted in a judgment in favor of the railroad company for $5,528.85. The news company contested its liability under the contract, and its defense was disallowed. The judgment of the circuit court of Jackson county was affirmed on appeal to the Supreme Court of Missouri on June 14, 1899. The case, which is reported may be found in 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. Rep. 545.

On November 18, 1899, appellant filed his petition in equity in the Jefferson circuit court of this state against appellee, in which petition it substantially set forth and pleaded the facts above stated, and prayed judgment against appellee for the sum of $7,609.57, with interest from July 27, 1899, which was the aggregate of the judgment paid to the railroad company, and the further sum of $1,560.19, with interest, being the costs incurred by the news company in defending the action. The defenses interposed to this action were: First, the special contract of limitation, contained in the seventh

provision of the policy, and above quoted. The next was that the amount of the estimated pay roll, namely $30,000, was exceeded prior to the occurrence set forth in the petition, and that before any payment of premium was made, extending or renewing or continuing said policy, the accident and occurrence set forth in the petition occurred, and that by reason of these facts the policy had terminated and was not in existence at the time of the accident. It was pleaded by the reply that as soon as said amount of wages, $30,000, should have been paid, the policy would terminate, unless it was continued in force for a further period by the payment and acceptance of a further premium; that the insurer knew that appellant compensated its employees by paying them a percentage or commission on the amount of their sales, which commission was indefinite and uncertain, and varied from time to time, all of which was explained to the insurer at the time of the application; that on November 29, 1890, appellee in writing notified the news company that the policy would expire on February 11, 1891, and on December 8, 1890, it further notified appellant that its pay roll or commission paid by its to its employees from the date of the policy to December 1, 1890, amounted to $45,370.63, and in addition to the premium of $150 paid February 11, 1890, the plaintiff then, on December 8, 1890, paid to the appellee the further sum of $100 as renewal premium, which was accepted in full satisfaction of such renewal due it from or about August 8, 1890. A demurrer to this paragraph of the reply was sustained. The court overruled appellant's demurrer to the plea of the special contract of limitation contained in the seventh paragraph of the contract sued on. Appellant declining to plead further, his petition was dismissed, from which it prosecutes this appeal.

As to the plea of limitation it was not good. The reasons therefor will be found in the opinion this day delivered in the case of Union Central Life Ins. Co. v. Harry C. Spinks, 83 S. W. 615. The demurrer should have been sustained to that part of the answer.

We are also of the opinion that the demurrer to the reply should have been overruled. The pleadings sufficiently show, and the contract shows, that the insurance was for a term of one year, that the rate of premium was based upon an estimated pay roll, and that when the pay roll, which was indefinite and uncertain, should exceed the estimate upon which the premium

was based, the policy would terminate, unless an additional premium was paid. Appellee, with full knowledge of its probable liability to the insured on account of the injury to its agent, Davis, accepted a premium covering the insurance, embracing the date of Davis' injury. The insurance was not only against loss, but it was against liability, and loss that resulted from liability. As the liability attached in this case when Davis was injured, although it was not consummated until it was fixed by judgment of a court of competent jurisdiction and paid, and although the loss actually occurred after the expiration of the policy, yet, as it was the direct and natural consequence of an injury and liability incurred during the term of the policy, appellee was liable under its contract.

Appellant after having notified appellee that the liability had been incurred by reason of the injury, was bound to make the loss as small as possible, so far as it reasonably could, although appellee did not avail itself of the provision in the policy to personally conduct the defense to the suit. Appellant might have compromised the claim, so that it acted in good faith and with reasonable prudence, such as a prudent person similarly situated would have done for himself. This would have bound appellee to pay to it the loss actually sustained, of which the compromise, if one was effected, as is charged, may have been taken into consideration as evidence of the actual loss sustained, but, of course, not conclusive evidence of it. Other evidence might also be admitted to show whether it was or was not a judicious and fair settlement.

Where the policy limits the amount of recovery upon the death of a person, the costs and expenses incurred in defending suits the insurer should have defended or settled, and interest thereon, are recoverable under the terms of this policy. Mandell v. Fidelity & Casualty Co., 170 Mass 173, 49 N. E. 110, 64 Am. St. Rep. 291; Mercantile Trust Co. v. South Park Residence Co. 94 Ky. 271, 22 S. W. 314. The suit against the railroad company by Davis' administrator was for $20,000. The news company was bound for all of it by its contract with the railroad company. Unless settled, it must have been defended. As appellee failed to defend, as it agreed to do unless it paid the $5,000 stipulated in its policy, it was incumbent upon appellant to defend. This defense was primarily for the benefit of appellee, though incidentally it might serve also as a protection to some

extent for appellant from additional liability above $5,000 to the railroad company. The hospital expenses, being above $5,000, and not included in the expenses of defending the Alabama suit, are not part of appellee's liability. Nor are appellant's expenses and costs in defending in the Missouri courts its own liability on its contract with the railroad company.

For the reasons indicated, the judgment is reversed, and cause remanded for further proceedings not inconsistent herewith.

ST. LOUIS DRESSED BEEF & P. CO. v. MARYLAND CASUALTY CO. 1906.

201 U. S. 173; 26 Sup. Ct. Rep. 400.

Statement by Mr. Justice HOLMES:

This case was brought here on the following certificate:

"The judgment which the writ of error challenges sustained a demurrer to the petition and dismissed the action. The plaintiff in its petition alleged the existence of these facts: The plaintiff is a corporation of the state of Missouri, and the defendant is a corporation of the state of Maryland. On June 16, 1900, the defendant, in consideration of the payment of $168, issued to the plaintiff a policy which contained these provisions: 'In consideration of the application for this policy, a copy of which is hereto attached and which is made part of this contract, and of one hundred and sixty-eight dollars ($168) premium, Maryland Casualty Company, of Baltimore, Maryland (hereinafter called "the company"), does hereby agree to indemnify St. Louis Dressed Beef & Provision Company of St. Louis, county of ———, state of Missouri, hereinafter called "the assured," for the term of one year, beginning on the 5th day of July, 1900, at noon, and ending on the 5th day of July, 1901, at noon, standard time, at the place where this policy has been countersigned, against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered by any person or persons, and caused through the negligence of the assured, by means of the horses or vehicles in his services, and the use thereof, as described in the application, and while in the charge of the assured or his employees. Provided, however, that:

" 'A. The company's liability for an accident resulting in injuries to, or in the death of, one person, is limited to five thousand dollars ($5,000) and subject to the same limit for each person; the total liability for any one accident resulting in injuries to, or in the death of, any number of persons is limited to ten thousand dollars ($10,000).

" 'This insurance is subject to the following conditions, which are to be construed as conditions precedent of this contract:

" '1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing, with full particulars, to the home office of any claim which may be made on account of such accident.

" '2. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company will defend against such proceeding, in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for in clause "A" of special agreements, as limited therein.

" '3. The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company, previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured, when requested by the company, shall aid in securing information and evidence, and in effecting settlements, and in case the company calls for the attendance of any employee or employees as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for their loss of time.'

" '8. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless, at the expiry of such period, there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above. In no case except that

of minors shall any action lie against the company after the expiration of six years from the date of the given injuries or death. The company does not prejudice by this clause any defenses to such action which it may be entitled to make under this policy.

" 'This policy shall only cover losses sustained by and liability for any claims against the assured as a result of the risk specified in the contract or contracts hereto attached, and is issued and accepted upon the condition that all the provisions printed on the slip or slips attached to this policy are accepted and shall be fulfilled by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed.'

"The portion of the policy hereinbefore quoted, commencing with the words 'against loss from common-law or statutory liability' and ending with the words 'entitled to make under this policy,' at the close of paragraph numbered 8, were printed on the slip attached to the policy

"On May 25, 1901, the plaintiff became liable for damages on account of bodily injuries accidentally suffered by Mrs. Nellie Heideman, and caused through the negligence of the plaintiff by means of a horse and vehicle in its service and the use thereof, as described in the application for the policy, and while in charge of one John Berry, who was one of the plaintiff's employees. The plaintiff immediately gave the defendant notice of the accident and of the fact that Nellie Heideman made a claim against the plaintiff for damages on account of the bodily injuries she had suffered from the accident, and that Henry Heideman, her husband, also made a claim for damages against it on account of the loss of the services of his wife and of the expenses of physicians and nurses which resulted to him from her bodily injuries. On August 16, 1901, the defendant notified the plaintiff that it denied that it was liable to it on account of the damages resulting from the accident under the policy because, as it alleged, the driver of the plaintiff's wagon was not an employee of the plaintiff, but the fact was that this driver was an employee of the plaintiff, and the accident and the damages were covered by the policy. On November 23, 1901, Nellie Heideman sued the plaintiff for $10,000 damages on account of the bodily injuries to her caused by the negligence of the plaintiff's driver and by the accident, and Henry Heideman brought an action against it for $3,000 damages, which he alleged he sustained from the same cause. On November 29, 1901, the plaintiff in writing notified

the defendant of the commencement of these suits, and requested it to undertake the defense of said suits as its said policy provides it would do. But the defendant declined to undertake the defense, upon the alleged ground that its policy did not cover the accident or the claims, while the fact was that it covered both. The injuries to Mrs. Heideman were, among others, the breaking of her right hip-joint socket bone, were serious and permanent, and the plaintiff was liable for damages in each of the suits. It feared heavy judgments if the actions were permitted to proceed to trial. Thereupon, on April 15, 1902, it compromised the suits, and paid Mrs. Heideman $2,000 damages and her husband $500 damages on account of the injuries caused by the accident and the negligence of its driver.

"The petition also contained the following averments: 'The plaintiff served on defendant a written notice, notifying it of the terms of settlement offered by said Nellie Heideman and Henry Heideman for the injuries sustained and damages suffered by them respectively, as aforesaid, and that plaintiff proposed to accept said settlements and pay said amounts, and to hold defendant responsible for such payment under its aforesaid policy; that defendant interposed no objection to said proposed settlements, relying upon its said disclaimer of any liability under said policy by reason of its alleged claim that the driver of said wagon was not in the employ of the plaintiff herein; and that said defendant, by reason of the said denial and disclaimer of any liability, waived all the conditions of the said policy as herein set forth. Plaintiff further states that by reason of defendant's failure and refusal to defend said actions brought by Nellie Heideman and Henry Heideman against plaintiff, and by reason of the waiver aforesaid, it was obliged to and did defend said actions and employed counsel for that purpose, at an expense of two hundred and fifty dollars ($250.00), and that said employment of counsel was reasonably necessary, and that said sum of $250.00 is the reasonable value of said services so performed.'

"And the circuit court of appeals for the eighth circuit further certifies that the following questions of law are presented by the assignment of errors in this case, that their decision is indispensable to a decision of this case, and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following questions:

"1. Did the denial of all liability by the assurer and its refusal to defend the suits in the name and on behalf of the assured, as provided by paragraph 2 of the policy, constitute such a breach of the contract on its part that it released the assured from its agreement in paragraph 3, that it would not settle any claim except at its own cost wtihout the consent of the assurer, previously given in writing, and from the provision of paragraph 8, that no action should lie against the assurer as respects any loss unless for loss actually sustained and paid by the assured in satisfaction of a judgment after trial of the issue?

"2. Were the provisions of paragraphs 3 and 8 of the policy, that the assured should not settle any claim except at its own cost, without the consent of the assurer, previously given in writing, and that no action should lie against the assurer as respects any loss under the policy unless brought by the assured to reimburse it for loss actually sustained and paid by it in satisfaction of a judgment after trial of the issue, waived by the assurer's denial of liability under the policy, and by its failure and refusal to defend the suit against the assured, according to the provision in paragraph 2?

"3. Did the compromise by the assured of the suits against it after the assurer denied liability and refused to defend them, and the payment by the assured of the damages claimed of it pursuant to the compromise, without the consent of the assurer and without the rendition of a judgment or a trial of the issues, prevent the assured from securing any recovery of the assurer upon the policy on account of the negligence, accident, and injuries described?

"4. Considering the terms of the policy, is the right of the assured to insist upon the condition of paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured dependent upon the assurer's defense of the action against the assured, according to the provision in paragraph 2?

"5. Considering the terms of the policy, is the assurer's denial of liability under the policy a waiver of the condition in paragraph 8 respecting the rendition of judgment after trial and its satisfaction by the assured?

"6. Under the terms of the policy, may the liability of the assured to the injured person and the extent of that liability be litigated in the first instance in an action between the assured and the assurer, where the assurer has denied its liability under the

policy, and has refused to defend an action brought against the assured by the injured person?"

Mr. Justice HOLMES delivered the opinion of the court:

An elementary remark or two will do something toward answering these questions. The form of the declaration does not appear, but we may suppose a count upon the casualty company's refusal to defend the suit against the plaintiff. If the defendant's contention is right, that breach made it impossible for the plaintiff to entitle itself to the payment promised in the policy according to its terms. But the defendant could not set itself free by so simple a device. In general, when one party, by his fault, prevents the other party to a contract from entitling himself to a benefit under it according to its terms, the former is liable for the value of that benefit, less the value or cost of what the plaintiff would have had to do to get it. In this case the plaintiff had nothing more to do or to pay after it had been compelled to satisfy the claim against it. And therefore on general principles, it would be entitled to demand the whole amount which the jury might find that it would have received had the contract been performed. Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. Rep. 875.

It is suggested, to be sure, that the plaintiff should have defended the suit against it. But not only was that not one of the plaintiff's undertakings, but it was expressly forbidden to the plaintiff by the contract, as no doubt the defendant would have pointed out had that course been taken. Moreover, the defendant, by its refusal, cut at the very root of the mutual obligation, and put an end to its right to demand further compliance with the supposed term of the contract on the other side. The only concern of the plaintiff was to establish reasonable ground for believing that if the defendant had not broken its contract it would have been called on to make a payment to the plaintiff, and how much that payment would have been.

Looking at the substance of the matter, it makes no practical difference, no difference in the amount of the defendant's liability, whether we say that the defendant, by its conduct, made performance of the conditions by the plaintiff impossible, and therefore was chargeable for the sum which it would have had to pay if those conditions had been performed, or answer, in the language of the questions, that performance of the conditions was waived. The sole difference would be in the form of the declara-

tion. In either case the plaintiff would declare upon the policy, only the breaches assigned would not be the same. In the former, the breach would be the refusal to defend; in the latter, the refusal to pay. If it is necessary to consider the question in a technical aspect, we think that the plaintiff was entitled to treat the contract as on foot, notwithstanding the defendant's act, and go on with it *cy-pres*. Under the circumstances it could not comply literally with the words, and was justified in doing the best thing that could be done for the interest of both. The defendant, by its abdication, put the plaintiff in its place, with all its rights. To limit its liability as if its only promise was to pay a loss paid upon a judgment is to neglect the meaning and purpose of the reference to a judgment, and even the words of the promise. The promise in form is to indemnify against loss by certain kinds of liability. The judgment contemplated in the condition is a judgment in a suit defended by the defendant in case it elects not to settle. The substance of the promise is to pay a loss which the plaintiff shall have been compelled to pay, after such precautions and with such safeguards as the defendant may insist upon. It saw fit to insist upon none.

We assume that the settlement was reasonable, and that the plaintiff could not expect to escape at less cost by defending the suits. If this were otherwise, no doubt the defendant would profit by the fact. The defendant did not agree to repay a gratuity, or more than fairly could be said to have been paid upon compulsion. But a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution.

But there is another aspect of the eighth condition of the slip which requires a few words more. It is said that this condition expressly contemplates a breach of contract by the company, and defines the plaintiff's rights in that case. The words "no action shall lie against the company as respects any loss under this policy unless," etc., certainly do contemplate a case in court in which the company may turn out to be in the wrong, and therefore technically guilty of a breach of contract. But notwithstanding the contrary suggestion in Sanders v. Frankfort Marine, Acci. & Plate Glass Ins. Co. 72 N. H. 485, 498, 499, 101 Am. St. Rep. 688, 57 Atl. 655, we think that the only breach which that condition has in view is a refusal by the company to pay after the decision in a case of which it has taken charge, when, not-

withstanding the judgment, it conceives itself to have a defense. The action referred to is an action for money alleged to be due under the policy. Contracts rarely provide in detail for their nonperformance. It would be stretching the words quoted to a significance equally hurtful to both parties, and probably equally absent from the minds of both, to read them as having within their scope an initial repudiation of liability by the defendant, and a requirement that, in that event, the plaintiff should be bound to try the case against itself, although it should be plain that by a compromise it could reduce its claim on the defendant as well as its own loss.

If there is anything in the doubt whether the defendant, by assuming the defense of the original suit, would not lose its right to deny that the policy applied, even if it purported to save that right, it does not change our opinion. The requirement of a trial and judgment would not accomplish the object suggested, to make collusion impossible. The objections to thus hampering the *dominus litis* have been touched upon, and there would be presented the anomaly, if not the monstrosity, of a party attempting to provide by contract that if he should do what, by general principles of contract, forfeited his right to make further requirements of the other side, his conduct, on the contrary, should impose new obligations on the other side. If the defendant kept its contract, it would defend the suit, and the plaintiff would have no duties. If it refused to do as it had promised, we cannot think that it was entitled to complain that the plaintiff did not do it, when the interest of both was the other way. Before a policy should be construed to have such an extraordinary effect honesty requires that the assured should be notified of his duties in unmistakable words.

We answer the first, second, fourth, and fifth questions in the affirmative, the third in the negative, and the sixth in the affirmative, so far as the question is warranted by the facts set forth. It will be so certified.

End

CHAPTER XXI.

CREDIT INDEMNITY BONDS.

a. Credit Indemnity Bonds are in the nature of insurance policies indemnifying against losses arising from commercial credits.

SHAKMAN v. UNITED STATES CREDIT SYSTEM CO.
1896.

92 Wis. 366; 66 N. W. Rep. 528; 53 Am. St. Rep. 920; 32 L. R. A. 383.

This action was based on a written "certificate of guaranty";

"No. 3452. Incorporated 1888. $5,000.
"United States Credit System Company, of the City of Newark, N. J.

"For and in consideration of the terms and conditions herein named, and of the sum of one hundred and forty-five dollars, paid by L. A. Shakman & Co., hereby grants, bargains, and sells to the said L. A. Shakman & Co. this certificate, issued under its copyrighted system of credits, in series A, class B, for the term of one year, commencing on the 1st day of July, 1889, and ending on the 1st day of July, 1890. And for said consideration the said United States Credit System Company guaranties, covenants, and agrees that if the said L. A. Shakman & Co. should, by reason of the insolvency of any debtor or debtors, who owe such debtor debts for merchandise sold and delivered during said period, under the credit system of said company as hereinbefore mentioned, or by reason of any uncollectible judgment or judgments that he or they may have obtained, for the sum or sums of money due for merchandise sold and delivered as aforesaid, have losses in excess of 1¾ per cent. on their total sales made during the above limited period, to pay such excess loss, not exceeding five thousand dollars, less the deductions, and subject to the terms and conditions hereinafter named. It is, however, expressly agreed and understood that this certificate forms a part of series A, and the company's liability to pay excess losses in any series is limited to the fund or funds provided for said series, as appears more specifically in the application signed by said L. A. Shakman & Co., which application forms a part of this certificate.

"Terms and Conditions.

"(1) That no credit which may have been given to any party or parties shall be included in the calculation of losses, unless he

or they were rated in R. G. Dun & Co.'s Mercantile Agency in the latest books or reports issued by it at the time of shipping the goods, and that no special or other report was received by said L. A. Shakman & Co. changing the same. And in case any change has occurred, such sale and shipment shall be considered to have been made in accordance with such change. (2) That, in calculating the losses, no credit that may have been given shall be included therein exceeding credit of 30 per cent. on the lowest capital rating such party or parties were rated in said Mercantile Agency's books or reports. (3) That, in the calculation of losses, no account against any debtor shall be included therein for more than ten thousand dollars. (4) That no credit that may have been given shall be included in the calculation of losses, unless the rating of the party to whom such credit is given was at least two thousand dollars ($2,000) at the time of shipping the goods, and that the credit rating was the best or next to the best for the capital. (5) All losses shall remain the property of said L. A. Shakman & Co., and in consideration thereof it is agreed that 12½ per cent. of the said 1¾ per cent. of the yearly sales, and 12½ per cent. of the losses incurred in excess thereof, not exceeding the amount of this guaranty, shall be deducted from both said sums, and the balance, after the deduction of the amount of said 1¾ per cent. on the said yearly sales, shall be the sum for which said company is liable. (6) That it shall be the duty of the said L. A. Shakman & Co. to notify said company of the insolvency of any of his or their debtors coming within the calculation of losses under this certificate, within ten days after receiving information of the same. Such notice shall state the name of the debtor, the place of business, date of shipment, amount thereof and amount still due. Upon failure to give such notice, such claim shall not be taken into the calculation of losses. (7) That, in presenting proofs of losses to said company, such proofs shall specifically show the facts upon which the guarantor bases the belief that the claims are a loss, a statement of the amount of the gross sales between and including date of beginning and expiration of this certificate, the names of the person or persons to whom the goods were sold, itemized account of the same, date of shipment, amounts paid on account, the discounts the debtor or debtors were entitled to receive; and said proofs of loss must be duly verified. (8) That all proofs of loss must be presented within six months after the expiration of the term mentioned and set forth in this certificate, or else the said claims shall be forever barred, even though the loss occurs on an account falling due after the expiration of said six months; provided, however, where any claim is in litigation, and notice thereof is given to the company, then, in that case, the loss, if any, shall be presented within ten days after the termination of said liti-

gation. (9) It is expressly understood that this certificate is issued under class B of this company, whereby the amount of the yearly sales of said L. A. Shakman & Co. are fixed between the sum of one hundred thousand dollars and two hundred thousand dollars; but, should such sales be of a greater or less sum than above fixed, then any loss sustained by the said L. A. Shakman & Co. would be settled by this company under the terms and conditions of the class to which it belongs, according to the classification system of this company. (10) That this company shall only be liable to the said L. A. Shakman & Co. for goods, wares, and merchandise by him or them owned, shipped, and sold in the usual course of his or their business and trade, and not for goods kept by him or them on consignment, and for which he or they have incurred no liability to pay for; nor shall said company be liable for claims arising from other sources. (11) The company shall pay all losses within sixty days after the proof of loss shall have been made. (12) There shall be no liability on the part of the company unless the said L. A. Shakman & Co. shall have continued his or their said business for the full period of the term herein mentioned and set forth, and should he or they not so continue, fifty (50) per cent. of the guaranty fee received shall be returned in full satisfaction of all claims against this company.

"Special: In condition No. 2, 20 per cent. is changed to 30 per cent. Condition No. 4 is changed so as to include sales to parties whose rating is K 3½ in Dun's Agency Book."

At the time of the delivery of this certificate, and before payment of the consideration or premium, Shakman objected that the policy did not allow the use of Bradstreet's reports of ratings as well as Dun's. There is a conflict in the evidence as to what followed this objection. Shakman's evidence tends to prove that Langsdorf said he would concede this, and that he had authority to do so, and that Lansdorf thereupon wrote, and delivered with the policy, the following slip: "Milwaukee, Nov. 8, 1889. Indorsement to certificate No. 3,452, in favor of L. A. Shakman & Co., to wit: Should any party to whom above-named firm may sell goods not be rated within the system of this company at Dun's Mercantile Agency, and Bradstreet's Agency does rate such party, within the system of this company, then, in such cases, the latter shall be binding upon this company. A. Langsdorf, Genl. Supt." Langsdorf, on the other hand, while admitting that Shakman objected to the policy because it did not allow the use of Bradstreet's ratings as well as Dun's, denies that he gave the indorsement to Shakman as a contract, but

says that he told him he would submit the matter to the company for their decision, and that he wrote out the indorsement simply to show Shakman how it would read in case the company approved it. At the same time, and after the delivery of the slip, Shakman paid to Langsdorf the premium of $155. It appeared that one Fishell was the partner of Langsdorf, and that their office was at Chicago, and that they styled it the "Western Department" of the United States Credit Company; Langsdorf calling himself general superintendent, and Fishell general manager. Langsdorf testifies that they assumed these titles without authority of the company, and really only had authority to solicit business and collect premiums. On or about November 26, 1889, the plaintiff received a letter from Fishell as follows: "Inclosed find indorsement slip, as requested, which please attach to the certificate, to take the place of the agreement left with you signed by our Mr. Langsdorf. Very respectfully, Albert Fishell, Mgr." The slip inclosed reads as follows: "Should Dun's Mercantile Agency not rate a party, and Bradstreet's Agency should give such party a rating or report, and such rating or report is sufficient to be covered by the system of this company, then and in that case the said L. A. Shakman & Co. may use Bradstreet's Mercantile Agency as a basis for such party. This special permission to take effect November 13, 1889. [Signed] Fred M. Wheeler, Secretary." The plaintiff read the letter, but not the slip, and paid no attention to it, and did not return it. The action was tried by the court, jury being waived, and the court made findings of fact substantially as above stated. As to the disputed questions with regard to the Langsdorf indorsement, of date November 8th, the court found favorably to the plaintiff's contention, and that it became a part of the contract on that day. The court further found that the plaintiff, during the period covered by the contract, suffered losses within its terms, amounting, in the aggregate to $6,502.47, and that, after deducting therefrom 12½ per cent. of such total, and 1¾ per cent. of the plaintiff's total sales, the net losses covered by the contract were $2,856.75. Due notice and proof of loss were also found, and the court found, as matter of law, that the defendant is an insurance corporation, and that the contract in question is a contract of insurance. Judgment for the plaintiff for $2,856.75, with interest and costs, was rendered, and the defendant appealed.

WINSLOW, J. (after stating the facts). We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is, in fact, much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. This very contract has been *(sub silentio)* construed as a policy of insurance by the supreme court of New Jersey. Credit System Co. v. Robertson (N. J. Sup.) 29 Atl. 421. The contract being, then, a contract of insurance, and the defendant's business being the making of such contracts, it follows that the defendant is an insurance corporation, within the meaning of sections 1977 and 1978, Rev. St. Langsdorf was its agent for the purpose of soliciting insurance, transmitting applications, and collecting premiums, and received pay therefor. He was, consequently, under section 1977, *supra*, its agent for all intents and purposes, and had power to make the additional agreement contained in the indorsement dated November 8th. Renier v. Insurance Co., 74 Wis. 89, 42 N. W. 208. The court has found, on ample evidence, that he did make that agreement, and the fact is therefore settled. It is, then, a fact in the case that a complete contract of insurance was made, on or about November 8th, by the terms of which the plaintiff was to have the right to use the Bradstreet's ratings in case a given customer was given no rating by Dun.

But it is said that the memorandum sent to the plaintiff November 26th, which permitted the use of Bradstreet's reports only after November 13th, 1889, became effective and binding by reason of the plaintiff's receiving it and failing to object thereto. We are unable to agree with this contention. The agreement of November 8th, being perfect, the letter and inclosed memorandum of November 26th could, at the most, amount to nothing more than a proposal to change the terms of the existing contract. This the plaintiff could do or not, as he chose; but it cannot be said that he did so unless he expressly agreed to the change, or unless his silence was legally equivalent to an express consent

to the proposed change. There was no express agreement to make the change, nor do we think that the simple failure to answer the proposal should be construed as such an agreement, in the absence of all evidence showing that the defendant was influenced in its conduct by plaintiff's silence. An agreement inferred from silence must, in such case, rest on the principle of estoppel; and one essential element of estoppel is lacking here, namely, a change of position on the part of the defendant, relying on the plaintiff's silence, which would result in substantial injury to the defendant were it not permitted to rely on the estoppel. The conclusion necessarily is that the contract which became perfected, November 8th, with the Langsdorf indorsement, became the contract governing the rights of the parties.

Another question now arises upon the construction to be given to the Langsdorf indorsement. It will be noticed that the policy, though dated October 23, 1889, in terms covers the period of one year commencing on the 1st of July, 1889, and that it insures against losses accruing for merchandise sold and delivered during that period. Thus, the contract covers several months' business transactions previous to its date. It appears in evidence that a considerable number of the losses for which the plaintiff has recovered judgment were suffered between July 1, 1889, and the delivery of the contract, and that these losses arose from credits given to parties who had no credit rating in Dun's reports, but did have such rating in Bradstreet's reports. It is now contended that the Langsdorf indorsement is purely prospective in its operation, and only insures losses occurring after November 8th; so that, for the losses occurring before that date, covered by Bradstreet's reports only, there can be no recovery. The indorsement reads: "Should any party to whom above-named firm may sell goods not be rated, within the system of this company, at Dun's Mercantile Agency," etc. The argument cannot prevail. This indorsement is part of the whole contract. It must be read in connection with all the other provisions of the contract, and as though it were incorporated in the contract at the proper place. So read, there can be no doubt that the contract refers to all goods sold and credits given between July, 1889, and July, 1890, and that the right to use the Bradstreet ratings in the proper cases was intended to be as broad in its terms as to time as the right to use the Dun ratings.

Subdivision 2 of the terms and conditions of the policy pro-

vides that, in calculating "losses, no credit that may have been given shall be included therein, exceeding a credit of 30 per cent. on the lowest capital rating such party or parties were rated at in said mercantile agency's books or reports." In a number of instances of losses the plaintiff had given the insolvent debtors a larger credit than 30 per cent. of their lowest capital rating. The court allowed, in such cases, 30 per cent, of such rating, and disallowed the excess. It is claimed by appellant that the clause means that the entire credit is to be excluded, and not simply the excess above 30 per cent. of the rating. This is purely a matter of construction of language, and our construction agrees with that of the trial court, namely, that it is only that part of the credit exceeding 30 per cent. of the rating which is to be excluded.

It is claimed that a loss of $300 suffered by the failure of one Simansky was improperly allowed. It appears that Simansky's name appears in Dun's reports with the notation "Blank 3"; that is, no capital rating, and credit "fair." In Bradstreet's reports, however, he appears rated "X D," which means $1,000 to $2,000 capital, credit fair. It seems to us that this loss was properly allowed. Simansky had no capital rating in Dun's reports. The system of the defendant required both a capital and a credit rating. This was, therefore, a case clearly within the Langsdorf indorsement, where the party was not "rated within the system of the company" at Dun's Agency, and was so rated in Bradstreet's Agency.

This case was tried and submitted to the court February 20, 1894, and taken under advisement by the court, and held under advisement until October of the same year. The original findings were signed and filed October 2d, and, on motion of defendant, were amended in some particulars on the 27th day of October, on which day the appellant's attorneys made proof to the court that, on the 2d day of October, the court of chancery of New Jersey had by decree declared that the defendant had ceased to be a corporation, and had forfeited franchises and rights under the laws of New Jersey, and appellant's attorneys objected to the entry of judgment for that reason. Thereupon the court ordered the findings to be dated and filed as of March 3d, so as to bring them within the term at which the case was tried, and also rendered judgment *nunc pro tunc* as of that day. This was right. The action was upon contract. Where such

an action has been fully tried and submitted, and taken under advisement by the court, and, pending the decision, a party dies, the court will not allow the action to abate, but will enter judgment as of the time when the action was submitted. The judgment forfeiting the franchises of the corporation could amount to nothing more than the death of an individual. 1 Black, Judgm. § 127; Mitchell v. Overman, 103 U. S. 62.

Judgment affirmed.

PEOPLE v. MERCANTILE CREDIT GUARANTEE CO. 1901.

166 N. Y. 416; 60 N. E. Rep. 24.

O'Brien, J. The defendant, as its name indicates, was incorporated for the purpose of making contracts of insurance or indemnity with traders and others to protect them from loss in their business by reason of the failure or insolvency of their customers. It seems that the company itself failed and passed into the hands of a receiver, and two of the parties who had been insured under its contracts presented claims to the receiver as creditors. The receiver rejected the claims, and upon a trial of the questions before a referee there was a report that the claims were not covered by the contract or policy of the company. The report was confirmed, and judgment against the claimants entered accordingly, which has been affirmed at the appellate division by a divided court.

There is no dispute about the facts, since they were found by the referee and appear in the record, and are embraced in the questions certified to us by the court below. The question before this court involves a construction of the policy or contract which the company delivered to the claimants, and which the latter insist entitles them to payment from the assets in the hands of the receiver. It will be convenient to consider the two claims separately, since the policies and the conditions governing the rights of the parties are different. The claim of the Winsted Hosiery Company amounts to $364.24, made up of three distinct items or debts due the claimant from three different customers for goods sold, namely: One Getz, $101.70;

one Moses, $176.14; and Robie & Co., $86.40. The two former debtors are in Texas, and the latter in Illinois. By the terms of the policy the defendant, in consideration of $90, insured the hosiery company "to an amount not exceeding three thousand dollars against loss sustained by reason of the insolvency of debtors owing the insured for merchandise usually dealt in, sold and delivered in the regular course of business." The policy contains numerous conditions and stipulations which qualify the general obligation of the insurer, but we are now concerned with only one of those conditions, which was as follows: "The term 'loss sustained by the insolvency of debtors' is agreed to mean losses upon sales made by the insured to debtors who have made a general assignment for the benefit of their creditors." The question, therefore, is whether, upon the facts found, the three debtors named, to whom the insured sold goods, and who failed, made a general assignment for the benefit of their creditors, within the fair meaning of this provision of the defendant's policy. They did make written transfers, respectively, of substantially all their property to pay or secure debts, and the question certified is whether either of the three instruments appearing in the record constitutes a general assignment, within the meaning of the policy, "when, at the time of their respective execution, the property severally described therein constituted substantially all the property of the respective debtors, and was at once delivered, and the respective debtors thereupon at once ceased to do business."

Before proceeding to answer the question, it would seem to be necessary to inquire with respect to the scope, purpose, and meaning of the policy under which the claim is made. It should be interpreted in such a way as to accomplish the general purpose in view, and at the same time give effect to all the conditions according to their fair and reasonable meaning. It would be very difficult indeed for any business man to determine the effect of all the conditions that appear in the policy in question, but not very difficult to ascertain what the claimants had the right to understand by the condition that we are now concerned with. The purpose was to indemnify the claimant from loss by insolvency of such debtors as had made a general assignment for the benefit of creditors. The claimant has sustained the loss, since an assignment has been made. The assignment or transfer in each case was for the benefit of cred-

itors or a creditor, and it is general in the sense that it embraced substantially all the property that the debtor had. The assignee in each case went into possession, and the assignor ceased to do business. The debtor owing the claimant thereby lost the title, possession, and dominion over all he had, and thereby became disabled to pay any one else. It would seem to be reasonable in such a case to conclude that the claimant had sustained a loss by reason of the insolvency of a debtor who had made a general assignment, within the fair meaning of the policy.

The contract in question was prepared by the defendant, and intended for use, not in any particular state or locality, but throughout the country generally. The local law of any state with respect to its construction is not to govern. Each state may have laws and statutes of its own that govern general assignments for the benefit of creditors, but these terms are not used in the policy in question in any statutory or local sense. When the defendant indemnified against insolvency of debtors who had made a general assignment for the benefit of creditors, the contract is not to be interpreted technically, but the language must be held to mean what the words import to the commercial world. Hence the character of the instrument or the nature of the transaction must be determined by the effect it has upon the debtor in the business community, and not by the name which the parties see fit to give to it. It may be a statutory assignment, a mortgage, a confession of judgment, or some other contrivance, the purpose and effect of which is to dispose of all the debtor's assets and disable him from paying his debts. In such cases the loss is fairly within the scope of the indemnity secured to the insured by this policy. It is the completeness of the transfer and its effect upon the debtor in business, and not the name or form of the instrument or transaction, that gives it character. Any transfer by a trader or merchant of all his stock and business, when it covers substantially all his property, may be an assignment, within the meaning of the policy, in spite of its form or the name given to it. Brown v. Guthrie, 110 N. Y. 441, 18 N. E. 254; Britton v. Lorenz, 45 N. Y. 51; Dana v. Lull, 17 Vt. 390; Kendall v. Bishop, 76 Mich. 634, 43 N. W. 645; White v. Cotzhausen, 129 U. S. 329; 9 Sup. Ct. 309, 32 L. Ed. 677. In case of ambiguity or uncertainty concerning the meaning of conditions in contracts of this

character, that meaning is to be adopted which is most favorable to the assured. Allen v. Insurance Co., 85 N. Y. 473. That rule is justly applicable to the words used in the policy in question when there is nothing to show that they were used in any narrow, special, or local sense. We think, therefore, that the three instruments described in the question certified were general assignments, within the meaning of the policy. This proposition will be made clearer by a brief reference to each of the instruments. The transfer by Getz, one of the debtors of the claimant, was made on the 20th day of April, 1896, in Texas. On its face it assigns and transfers to a trustee named all his stock of goods, including fixtures and furniture of all kinds in his store, in trust for the benefit of creditors. The trustee is directed to sell the property, and, after deducting the expenses of executing the trust, to distribute the proceeds among the list of creditors named. The instrument is duly acknowledged and recorded. If we were disposed to hold—as we are not—that the general assignment referred to in the policy is the statutory assignment for the benefit of creditors known to the laws of this state, it would be difficult to show wherein this instrument is in any substantial sense defective. The instrument made by Moses in the same state bears date October 18, 1896, and is in the same form substantially. It assigns to a person named all his stock, fixtures, and store furniture in trust for the benefit of a long schedule of creditors named, with direction to sell and distribute. The trust was accepted by the trustee, and the instrument is acknowledged and recorded. At the close of the instrument, however, is the statement that it is "intended as a mortgage." This statement does not change the character of the transaction in the least. To hold otherwise would be to sacrifice substance to mere names and words. It could not very well be a mortgage in any legal or proper sense. The assignor did not owe the assignee any debt, and consequently the latter could not well be a mortgagee in the ordinary sense. If it was a mortgage at all, it was a trust mortgage,—that is, for the benefit of creditors; and I am unable to perceive any difference betwen that kind of a trust and any other.

The third instrument, made by Mrs. Robie in the state of Illinois on the 22d of December, 1896, is undoubtedly in form a chattel mortgage, but it does not follow that it is not also a

general assignment, within the meaning of the policy. It conveyed to a person named all the stock of merchandise in the store in the broadest terms, including fixtures, furniture, dynamos, lamps, and even the horse, wagon, and harness used in the business. This was stated to be as security for over $30,000 in notes bearing even date with the mortgage, all payable in different sums at different times, but all within six months, with the usual unsafe clause. We have also the fact stated in the question that the assignor or mortgagor gave up the possession and went out of business, and that the transfer covered substantially all of her property. This transaction is none the less a general assignment, within the meaning of the policy, because it was made to take the form of a mortgage. The transfer was general, since it covered all the assignor had. The fact that it was for the benefit of one creditor instead of all, only adds to the completeness of the insolvency. It had all the effect upon the debtor and her creditors that a general assignment for the benefit of creditors in the strictest statutory sense could have, and so we think it is a general assignment, within the fair meaning of the policy. It follows that the claims of the hosiery company, which have been described, should have been allowed. A general assignment, within the meaning of the policy, may be for the benefit of a single creditor or all. It may be in the form prescribed by state statutes, or an assignment at the common law. The form of the transaction is not so material as the result, when it operates to divest the debtor of substantially his entire property and closes out his business. Such a transfer means insolvency, within the fair scope of the indemnity. Wheel Co. v. Fielding, 101 N. Y. 504, 5 N. E. 431; Tiemeyer v. Turnquist, 85 N. Y. 516; Knapp v. McGowan, 96 N. Y. 75; Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548.

The other claim was presented by the Daniel Forbes Company of Chicago under a different policy, involving the meaning of other conditions. The general purpose expressed is the same as in the policy just considered, and it expired on the 30th of April, 1897. The claim was rejected on the ground that it had not accrued within the life of the policy. It amounts to $441.97 for goods sold to an insolvent debtor, and it is claimed that the following conditions of the policy exclude it from sharing in the assets held by the receiver: (1) "Only

such amounts as are actually owing by an insolvent debtor to the insured at the date of his insolvency shall be taken into the calculation of losses under this policy, and only when the said debtor has made a general assignment for the benefit of his creditors, or has been declared insolvent in legal or judicial proceedings, or an execution has been returned unsatisfied on a judgment obtained against him by the insured, or some other creditor, for merchandise sold to said debtor during the period covered by this policy, provided said execution has not been returned after the appointment of a receiver or trustee of the property of the debtor." (2) "This policy shall expire on the 30th of April, 1897, and any loss by reason of the insolvency of any debtor after said time shall not be provable hereunder." (3) "Final verified proofs of loss must be presented to the company within sixty days after the expiration of the policy, and no loss is payable unless included in such proofs submitted within that period. Losses to be adjusted and paid within sixty days after final proofs."

The claimant's debt was for goods sold, and judgment was recovered thereon, and execution issued, 12 days before the policy expired, but the execution was not returned unsatisfied till 3 days after,—that is, on May 3, 1897,—and the question certified to us is: "Did the return of the execution unsatisfied * * * on May 3, 1897, constitute it an insolvent debtor, for which the * * * company was liable under the terms of the Daniel Forbes policy?" I think that this claim is fairly within the indemnity provided by the policy. (1) The conditions require that the judgment be obtained "for merchandise sold to said debtor during the period covered by this policy." That condition is satisfied by the facts of this case. (2) Any loss by reason of the insolvency of the debtor after the expiration of the policy is not provable. That means that the loss and the insolvency must occur within the year covered by the policy. Both facts did occur within that time in this case. (3) There is no express limitation in the policy with respect to the time when the execution is to be returned, except that it must not be returned "after the appointment of a receiver or trustee of the property of the debtor." That did not happen in this case. (4) The only limitation in the policy concerning the return of the execution is implied in the condition that final verified proofs of loss must be presented within 60 days

after the policy expires, and no loss is payable unless included in such proofs submitted within that time. It may be possible that, unless the execution is returned within the 60 days limited for presenting final proofs, the insured will not be able to make proof of his claim. But in this case the return was made within 3 days after the policy expired, so that the insured could and did present the claim in his proofs. To sustain the decision under review it is necessary to hold that not only must the goods be sold within the life of the policy, and the judgment rendered and execution issued, but that it must be returned unsatisfied within that time, which is one year; and that, too, when there is no language in the policy or in the conditions which would warrant such construction. It would reverse the legal rule for the interpretation of such conditions, and require us to hold that they are not to be construed liberally in favor of the insured, but strictly against him, by importing into the contract words that the parties have not used. The return of the execution does not constitute the main fact of insolvency, but is simply evidence of that fact; and if the insured, when presenting his proofs of loss within the time stipulated, can show that it has then been returned, that is a compliance with the terms of the policy. Slomau v. Guarantee Co., 112 Mich. 258, 70 N. W. 886. The contention that the goods must be sold, judgment recovered, and execution issued and returned unsatisfied, all within the year, would defeat, in most cases, every purpose of the insured in entering into the contract, and destroy all benefits to be derived by him under it. The sheriff in this state has 60 days within which to return the process, and perhaps in other states even a longer time, and, if the insurer can be held only on such judgments and executions as have been returned unsatisfied within the year when the goods are sold, the indemnity to the insured is a delusion. It is very clear that no such construction should be adopted unless the language employed admits of no other. When the conditions of this policy are carefully read, it will be seen that such an extreme and destructive stipulation is not to be found. No language has been employed to limit the liability of the insurer to debts upon which an execution has been returned unsatisfied within the year, and that proposition comprehends the whole question. Such a limitation cannot be based upon conditions that are obscure or of doubtful mean-

ing. Wadsworth v. Tradesmen's Co., 132 N. Y. 540, 29 N. E. 1104.

I cannot perceive that the case of Talcott v. Insurance Co., 9 App. Div. 433, 41 N. Y. Supp. 281, affirmed in this court without opinion (163 N. Y. 577, 57 N. E. 1125), has any bearing upon the questions now before us. That action was against another company upon a very different instrument. That case turned upon a condition in the contract to the effect that the insurer should not be liable for any losses of which it did not receive notice during the life of the policy. The present appeal involves no such question. What must be found in the present policy in order to sustain the decision below is a plain condition that the insurer will not be liable for any losses unless an execution is returned unsatisfied before the date of the expiration of the policy. No such condition can be found in the instrument. The condition is that the insurer is not to be liable for any loss not included in proofs of loss to be presented within 60 days after the policy expires.

Our conclusion, therefore, is that the claims presented to the referee, and here discussed, should have been allowed, the questions certified should be answered in the affirmative, the order of the appellate division and the special term should be reversed, with costs, and the case remanded to the special term for a further hearing.

Parker, C. J., and Haight, Vann, and Landon, JJ., concur. Bartlett and Martin, JJ., concur, except as to the claim of the Forbes Company, as to which they dissent. Execution should be returned within the life of the policy.

Ordered accordingly.

SLOMAN v. MERCANTILE GUARANTEE CO. 1897.

112 Mich. 258; 70 N. W. Rep. 886.

Hooker, J. This action was brought upon an insurance or guaranty policy, which provided that, "in consideration of the sum of $72, hereby insures S. A. Sloman & Co., of Detroit, in the state of Michigan, to an amount not exceeding $2,000,

against loss sustained by reason of the insolvency of debtors owing the insured for merchandise usually dealt in, sold, and delivered in regular course of business, between the 1st day of April, 1893, and the 31st day of March, 1894, both inclusive, in excess of ¾ per cent. on the total gross sales and deliveries made during said period, subject to the terms and conditions printed below or attached hereto. This policy shall expire on the 31st day of March, 1894." The insured sent 9 notices of loss to the insurer before March 31, 1894, and 22 after that date, but within 90 days after such date. Those last mentioned were admitted in evidence, subject to an objection "that these losses were not covered by the policy, and were not sent in during the life of the policy."

Under a request to charge, it is claimed that the court should have excluded from consideration by the jury all claims of loss not shown to have accrued before April 1, 1894. The question discussed is whether the policy covers losses where the insolvency or act of the debtor which makes the debt a loss, within the meaning of the policy, occurred after March 31, 1894, that being the date of the expiration of the policy; and counsel for the plaintiff argue that it cannot be reasonably said that the parties intended that the sales on the last day, viz., March 31st, should not be protected by the policy, as would be practically the case if the defendant's claim is the correct one. He (the plaintiff) urges that the loss may occur afterwards, and that if the insured serves his notice within 10 days after learning of the loss, and makes his final proofs of loss within 90 days after the date upon which the policy expires, he may recover for a loss that occurs after such expiration. From that portion of the policy quoted, it is said that the losses to be covered are those that arise upon sales made between the 1st day of April, 1893, and March 31, 1894. There seems to be no dispute about this. In addition to that portion hereinbefore quoted, the policy provides that "the insured shall notify this company by registered mail . . . of the insolvency of any debtor, within ten days after he receives information of the same"; also, "final verified proof of loss . . . . must be presented . . . . within 90 days after the expiration of the policy"; and, again, "no loss shall be payable unless included in said proof of loss submitted within said stated period. Should, however, this company renew the policy, or issue a new one, on or before the

expiration hereof, a loss occurring after such expiration, on a sale and delivery of merchandise, made during the existence of the policy, shall be payable in the same manner as if it occurred under the renewal or new policy." It is obvious that this policy contemplates a credit business, for there would be nothing to insure if it does not. The time and terms of credit are not fixed, nor can we indulge in any assumptions upon the subject beyond the inference that the usages of trade in this respect were expected to be followed. Of necessity, there would be sales made during a time immediately preceding March 31, 1894, upon which the plaintiffs would receive no indemnity under this policy if defendant's construction is to be adopted, unless insolvency should immediately follow the purchase. The sales made during the period are clearly covered by the policy, and it is improbable that it was intended that the insured should be deprived of indemnity upon such sales; and, unless the policy clearly indicates such intent, the writing should not be so construed. The clauses which are said to give the policy such effect are the statement that "this policy shall expire on the 31st day of March, 1894," and the clause relating to renewals, already quoted. Under the several provisions quoted, the right to recover a loss depends upon the presentation of final, verified proof of loss within 90 days after the expiration of the policy. To this there is an exception, viz., in case where a new policy or renewal is issued on or before the expiration of the old policy, in which case the intent is plain that the insured should be permitted to recover for a loss occurring after the expiration of the original policy, at any time when losses occurring under the renewal might be recovered. This appears from the last clause mentioned, and is dependent upon it; and it is not necessary to infer from that provision that losses occurring after the 31st of March are not recoverable at all, unless by reason of the renewal. It is just as consistent to say (so far as this provision is concerned) that the loss occurring thereafter is limited to cases where proof is filed within 90 days as to say that they are excluded altogether, unless the policy is renewed. This leaves the contention with no other support than the statement regarding the expiration of the policy, which is met by the improbability of parties intending to take all substantial benefit away from the insured upon a considerable portion of the sales actually covered by the policy, and an extension of 90

days, or (perhaps more properly speaking) a limitation to 90 days, of the time within which proofs should be made regarding losses upon sales made during the life of the policy. We are of the opinion that the fairer view to take is that the provision in relation to the expiration of the policy refers to the time when sales, to be covered thereby, shall cease, and that it does not determine the time when losses must occur upon such sales, but that these shall be recoverable, regardless of that date, subject to the limitation as to final proof. This conclusion is justified by the rule that an ambiguity in an instrument is to be resolved against the draftsman, which is supported by authorities cited by counsel. See Tebbets v. Guarantee Co., 19 C. C. A. 281, 73 Fed. 95; Wallace v. Insurance Co., 41 Fed. 742; Wadsworth v. Tradesmen's Co., 132 N. Y. 540, 29 N. E. 1104; Guarantee Co. v. Wood, 15 C. C. A. 563, 68 Fed. 529; Bank v. Wilkin (Wis.), 69 N. W. 355; Shakman v. System Co. (Wis.), 66 N. W. 532.

We think the court did not err in admitting proof of the losses which occurred after March 31, 1894. The final proofs of loss were received in evidence against objection, and the court failed to instruct the jury (as requested) that such proof could not be taken as proof of any fact therein contained. We are satisfied that such document was not proper evidence of the fact of loss, but if there was not other evidence of loss, upon each of the items submitted to the jury, counsel do not show or state the fact. No testimony was offered by defendant's counsel, and the *prima facie* case of plaintiff, not being contradicted, was sufficient evidence, and defendant was not injured by the failure to give this request. Counsel say that this document was assumed to be *prima facie* evidence of the claim, but we find testimony which supports it. Mr. Sloman testified, without objection, that the paper "correctly represents the insolvent's accounts and losses sustained," etc. Upon cross-examination he was examined at length upon the respective items.

The next important question raised relates to the alleged refusal to instruct the jury that "there must be borne by the plaintiffs losses amounting to $525 before the defendant's liability begins." The court did instruct the jury upon this subject. He said: "It appears that, in estimating the losses under the terms of this contract, the amount of yearly sales which the plaintiffs were authorized to make, as far as this contract bears

upon the losses in this case, was $70,000. It also appears that there is to be deducted from these losses three-quarters of one per cent., according to the terms of this policy." If it appeared that this meant three-fourths of 1 per cent. upon the losses, instead of upon $70,000, it would be erroneous; but there is everything to indicate that the plaintiffs' counsel made no such claim, and that all concerned understood the amount to be $525. Apparently, the court supposed that he was giving the substance of the request, as indeed he was if the amount was not in dispute. His attention was not called to the matter by exception or otherwise, and we should not reverse the case upon a technical construction of language if it misled no one.

Error is assigned on the refusal to direct the jury "that the loss claimed on A. S. McDonald's account was not a loss under the terms of the policy." Mr. Sloman said that it appeared that all that remained of this item consisted of attorney's fees, protest fees, and expenses, and sundry small claims, which McDonald would not recognize or pay, and which they did not care to litigate. Counsel say that this testimony shows that the entire claim was for attorney's fees, expenses, interest, and protest fees, and in no sense a claim for goods sold and delivered, and was not covered by the policy, and, furthermore, that it appears that in the computation it must have been allowed in full. It seems to be conceded by counsel for the plaintiffs that this was a claim for attorney and other fees, etc., and not a balance upon sales; and we think the evidence shows it. It does not appear that it was not included in the verdict, nor is its allowance in any way disputed by counsel. It is true that the court repeatedly said that attorney's fees could not be recovered, and it is not surprising that this subject should have been overlooked as to other items. We think, however, that the request should have been given, and this claim withdrawn from the jury. We are of the opinion that the sale of the Burrows and McKinstry stock by the sheriff brought this claim within the terms of the policy. The claim against Webb was clearly so, under the execution, returned unsatisfied, and the same is true of the Zabbets claim, upon the report of the collection agency to which it was sent. As there is reason to believe that the McDonald claim was included in the verdict, we feel constrained to reverse the judgment, and direct a new trial, unless the amount of said

claim shall be remitted. The defendant should recover costs of this court. It is so ordered. The other justices concurred.

On Motion to Modify.

(April 27, 1897.)

In this cause the defendant's counsel move a modification of the judgment, counsel for the plaintiffs having elected to remit the sum of $140.32, as permitted by the opinion filed. The motion is based upon the claim that, after deducting the sum of $140.32, the judgment is still greater by $107.18 than it should be. The original brief of the defendant contains a computation purporting to show that plaintiff sustained losses upon accounts against "rated debtors" of $375.36, and unrated debtors $500, making $875.36, from which the "initial loss" to be borne by plaintiffs, of $525, should be deducted, leaving, with interest added, $380.13 as the total, including the McDonald claim of $140.32, which being deducted, would leave $239.81 as the limit of defendant's liability. It is admitted that the question was not raised by an exception, but it is urged that, inasmuch as error was found upon another point, the court should have ordered a new trial, inasmuch as the judgment was clearly excessive, after deducting the McDonald account of $140.32. If we accept the theory of defendant's counsel upon the law, we must then inquire whether the evidence in the case supports his claim that the verdict was excessive.

In plaintiffs' original brief, counsel submit a table which he asserts to be correct. Whether it is or not depends on the version of each account being verified by the undisputed testimony. We are not only not referred to the pages of the record sustaining the defendant's contention as to all of these items, but the brief does not advise us that all of the testimony is included in the bill of exceptions. The brief filed on this motion is open to the same criticism. It gives a list of debtors that it says were rated, and states that the others were unrated, quoting appellant's statement of the case in the former brief as evidence of the fact, and stating that this was not disputed by counsel for the plaintiffs. As the case was presented, counsel for the defendant had no occasion to dispute the accuracy of the statement, as its only importance was in connection with an assignment, which was not

based upon an exception. In the brief filed in opposition to this motion, it is disputed, and the claim made that a number of rated debtors are classed as unrated in defendant's table.

It is a general rule that error will not be presumed, but must be made to appear. The only error clearly shown involved $140.32, and we required plaintiffs to remit the amount or submit to a new trial. We are now asked to grant a new trial upon the statement of counsel that the verdict is excessive. If this record clearly showed that items were included in the verdict unjustly, it may be doubted if we should send the case back for a new trial, if error was not assigned upon them, inasmuch as counsel see fit to remit the only claims upon which error was assigned. Still less would we be justified in doing so where the record makes it uncertain that the verdict was excessive. It is the practice of this court to refrain from ordering new trials where the record is such as to enable it to eliminate the errors, and render a judgment for the items regarding which no error is shown. One of the most pernicious features of our jurisprudence is the opportunity afforded to defeated litigants to compel their opponents to follow cases up and down through various courts, until costs become the principal controversy, and the original causes of action merely incidents, and citizens hesitate to commence a petty justice court case, lest it should ultimately involve them in financial ruin. Justice is practically denied to a large class of people. While it seems to be the policy of the law to allow this sort of thing, it has always been the practice of the courts to put an end to litigation as soon as the circumstances of the case will permit, with safety to the interests involved. The presumption is, as it should be, that justice was done in the circuit court; and, the contrary not being shown, we see no occasion to compel the plaintiff to submit to another trial, upon a suspicion that the verdict was excessive. The motion is therefore denied. The other justices concurred.

HOGG v. AMERICAN CREDIT INDEMNITY CO. 1898.

172 Mass. 127; 51 N. E. Rep. 517.

Holmes, J. This is an action upon a bond of indemnity, within certain limits, against loss resulting from insolvency of debtors, as afterwards defined, "on total gross sales . . . amounting to $120,000 or less; said sales . . . to be made between the 15th day of June, 1896, and the 14th day of June, 1897, both days inclusive." The bond was "to expire on the 14th day of June, 1897." By a rider attached to the bond "losses occurring after payment of premium, on sales and shipments made from the 1st day of April, 1896, to the 15th day of June, 1896, may be proven under this bond," etc. The two losses in respect of which the plaintiff claims indemnity may be assumed to have been upon sales made within the time limited by the instrument, but the insolvency causing the loss in each case occurred after June 14, 1897. The defendant demurs, the principal ground of demurrer being that the bond does not cover losses from insolvency occurring after the term of the bond.

As we are of opinion that the defendant must prevail upon this ground, we do not go into details which are unnecessary for the discussion of this point. We fully appreciate the great probability that a business man reading the contract without warning might understand that he was getting the protection which the plaintiff claims. We appreciate the small worth or worthlessness of the bond for sales made during the last part of the term covered, when we consider the definition which it gives for the term "insolvency of debtors," as used in the bond. If we could see a reasonable doubt as to the meaning of the instrument, we should give the plaintiff the benefit of it. But whatever doubt may be left by the words, "to expire on the 14th day of June, 1897," seems to us removed by the language of three conditions, all of which lead to the same result. By the fourth condition, "notification of claims must be delivered to this company . . . within ten days after the indemnified shall have had information of the insolvency of any debtor, and must be received at the central office of the company at St. Louis, Mo., during the term of this bond; otherwise such claims shall be barred." This is perfectly explicit, and cannot be reconciled

with the plaintiff's construction except by arbitrarily assuming that construction to be correct. The plaintiff says that it must be limited to cases where the conventional insolvency occurs during the term of the bond. Of course it must, as it could not be complied with in any other. But the conclusion is not that there are other cases for which the bond makes no provision at all, but that this requirement, universal in form, is universal in fact, and covers all the cases to which the bond applies. So, by condition 12-C: "A final statement of all claims which have been filed in accordance with condition No. 4 shall be made. . . . Such final statement must be received at said office within 30 days after the expiration of this bond; otherwise all claims hereunder shall be forever barred. The adjustment of claims shall be had within sixty days after receipt of such final statement by the company, and the amount then ascertained to be due shall at once become payable." This plainly provides for the winding up of all claims upon the bond. Finally, by the eighth condition, "in case this bond is renewed, . . . loss on sales covered, . . . resulting after said date of expiration, upon shipments made during the term of this bond, may be proven under and subject also to the terms and conditions of such renewal." Then follows a similar provision in case this bond is a renewal. This contemplates cases like the present, and contemplates and encourages renewals as the means by which bondholders could get the benefit of continuous insurance. Unless that means is resorted to, there is no protection for losses "resulting after said date of expiration upon shipments made during the term of this bond."

Judgment affirmed.

STROUSE v. AMERICAN CREDIT INDEMNITY CO. 1900.

91 Md. 244; 46 Atl. Rep. 328.

Argued before McSherry, C. J., and Page, Pearce, Boyd, Briscoe, and Schmucker, JJ.

McSherry, C. J. The record in this case is quite voluminous. There are seven bills of exception,—six signed at the request of the defendant, and one at the instance of the plaintiffs. The plaintiffs offered five prayers, four of which were rejected. The

defendants presented sixty-nine prayers, three of which were granted. The court gave six instructions drawn by the plaintiffs in accordance with the trial court's views. There are fourteen special exceptions to these instructions, and there are twenty-five motions to strike out evidence admitted subject to exception. It will be simply impossible to treat separately each of these one hundred and twenty-six questions, and we must accordingly content ourselves with a general discussion of the controlling legal principles applicable to the whole case, and then reduce to appropriate groups these numerous points, and in that way dispose of them.

The suit was instituted by Strouse & Bro. against the American Credit Indemnity Company of New York upon a bond of indemnity. The American Credit Indemnity Company is a company which, for a stipulated premium, guaranties a creditor to a specified amount against losses resulting from the insolvency of his debtors. It furnishes a species of insurance. The bond which it issues is coupled with many conditions. On the 5th day of June, 1893, this company, in consideration of a written and printed application, which was made part of the contract of indemnity, and upon the payment of $580, and in further consideration of the acceptance of its terms and conditions embodied in the bond, bargained and sold to Strouse & Bro. a bond of indemnity guarantying them against loss to the extent of and not exceeding $20,000, resulting from the insolvency of debtors, over and above a net loss of $7,500, first to be borne by the indemnified, on total gross sales and deliveries of goods, wares, and merchandise amounting to $1,600,000, and made between June 1, 1893, and May 31, 1894, to firms, corporations, or individuals actually engaged in commercial and mercantile pursuits in the United States. Most of the conditions consist of descriptions of what are provable debts, and of directions as to the mode of proving them. Some of these must be stated, because upon their construction much of the controversy depends. The indemnity company is not liable for any debts unless the debtor has a certain rating in Dun & Co.'s Mercantile Agency Book, and its liability is limited, as respects any one insolvent debtor, to 35 per cent. of the lowest amount of the capital rating given such debtor by that agency, and no account against any one insolvent debtor can be proved for more than $10,000. Proof of loss must be furnished within 20 days after

knowledge of the insolvency of any debtor shall have been received by the indemnified, and final proof of loss must be forwarded within 20 days after the expiration of the bond, and the amount due by the company must be adjusted, and is made payable, within 60 days after the receipt of the final proof of loss. Both the preliminary and the final proofs of loss are required to be made on blanks provided by the company. This scheme of indemnity includes two classes of losses,—the one, an initial loss, which must be borne by the indemnified; the other, a loss in excess of the initial loss, which must be borne by the indemnitor. Both kinds of losses are such as result from the insolvency of debtors who owe the indemnified.

Obviously, the inquiries which first suggest themselves are these: What is meant by the term "insolvency," as used in the body of the bond? Which are the losses that belong to the two classes, respectively? What is the period of time at which the initial loss must be ascertained? as upon the location of that time the extent of the liability of the indemnitor in a large measure depends.

It is insisted by the company that the term "insolvency" is limited and defined by conditions 11a and 11b, indorsed upon the bond. These clauses are as follows: "(11a) General assignments of or attachments against insolvent debtors, the absconding of the debtors, or executions returned *nulla bona,* shall constitute insolvency." "(11b) The appointment of a receiver, a 'sell-out,' or the death of a debtor does not establish insolvency, but the indemnified may prove such claim during the term of this bond or renewal thereof, provided legal proof shall be given establishing the insolvency of the debtor." These bonds of indemnity and certificates are contracts confined to the business affairs of merchants, and relate exclusively to the insolvency of merchants. Naturally, then, it must follow that the insolvency against which they afford indemnity is "insolvency" as understood by merchants and as defined in bankrupt and insolvent laws relating to merchants and mercantile transactions, unless a contrary and different purpose is clearly and unequivocally manifested by some term of the contract. On the face of the bond, protection against loss "resulting from the insolvency of debtors" is afforded. The insolvency designated is the usual legally defined "insolvency," which is an inability of the debtor to pay his debts as they fall due in the ordinary course

of business, and this is dependent neither upon a formal adjudication, nor on an actual insufficiency of assets to meet liabilities. Castleberg v. Wheeler, 68 Md. 266, 12 Atl. 3. As a defeasance clause limiting the liability of the indemnitor must be clearly expressed and strictly construed (Indemnity Co. v. Cassard, 83 Md. 272, 34 Atl. 703), conditions 11a and 11b cannot be held to narrow the meaning of the term "insolvency" as used in the body of the instrument. "General assignments of, or attachments against, insolvent debtors . . . shall constitute insolvency." "The absconding of debtors, or executions returned *nulla bona,* shall constitute insolvency." Obviously, this means that these things shall constitute evidence of insolvency. It is not every general assignment, or every attachment, that is declared to constitute insolvency; but such an assignment made by, or an attachment issued against, an insolvent debtor. But who is an "insolvent debtor"? Unless you reason in a vicious circle, the answer must be one who is unable to meet his obligations as they fall due in the ordinary course of business. An execution returned *nulla bona* cannot constitute insolvency. The return is the act of an officer, and not of the party, and no act of a third person can constitute a debtor's insolvency. Insolvency is a status. Brown v. Smart, 69 Md. 332, 14 Atl. 468, 17 Atl. 1101, affirmed in 145 U. S. 457, 12 Sup. Ct. 958, 36 L. Ed. 773. The return on an execution may be evidence of that status, but is not the status itself. These four things named in clause 11a do not create the status or condition of insolvency; they are simply results which flow from the antecedent, pre-existing insolvency. They are therefore evidence of the thing from which they proceed; they are not the thing itself. Section 11b makes this demonstrably clear. The appointment of a receiver, a sell-out, etc., does not establish—that is, does not prove—insolvency; but "legal proof" may be given establishing the insolvency of the debtor; that is, establishing his inability to pay his debts as they fall due in the ordinary course of business. Now, if nothing but the things named in 11a constituted insolvency, there could be no "legal proof" of insolvency, under 11b, because there could be no insolvency to be proved unless there was a general assignment, an attachment, an absconding, or a return of *nulla bona.* A thing which in its very nature cannot constitute insolvency, though it may constitute evidence of insolvency, cannot, by being called insolvency, be other than

it intrinsically is, namely, a means of proving the existence of insolvency. This must be so unless the thing to be proved is identical with the thing that proves it,—unless insolvency as a fact, and the evidence which proves that it is a fact, are one and the same thing. But the two are manifestly different. In American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co., 36 C. C. A. 671, 95 Fed. 114, there was a suit against this same defendant on a bond issued in 1895. In bonds issued by it after 1893, clause 11a was materially modified. Insolvency was limited and defined by the modified clause, thus indicating that the defendant did not itself consider that the precise clause now before us imposed a limitation as it stood prior to the change.

One of the difficulties with respect to the ascertainment of what losses are to be included in the initial loss of $7,500 is alleged to arise out of condition 12a, which is in these words: "To simplify adjustment and to avoid disputes, it is agreed that such sum of gross loss shall be the limit to be borne by the indemnified, as less 25 per cent. will equal the agreed amount of annual net loss; all claims making up such said sum of gross loss to remain the property of the indemnified, the company relinquishing its claims except as hereinbefore provided." The face of the bond having limited the liability of the indemnitor to losses in excess of a net loss which the indemnified was required to sustain in the first instance, it obviously became necessary to prescribe some method by which the net loss should be ascertained. The very term "net loss" implies a resultant, remaining loss after credits or collections are to be deducted. But what credits or collections are to be deducted? It might in many, if not in most, cases be impossible to estimate in advance of their actual receipt what these credits or collections would aggregate, and yet, until ascertained or estimated, a net loss could not be determined; and thus there would be a wide field for controversy left open, perhaps long after the period for adjustment had passed. To preclude just such controversies, this clause 12a, which fixes by agreement an amount that the parties stipulate shall be the equivalent of the net loss, and shall be considered the indemnified's initial loss, was inserted. It was not possible to express the amount in dollars and cents, because the net loss of $7,500 was fixed at 15/32 of 1 per cent. upon a basis of sales amounting to $1,600,000, and was to increase,

under the provisions of clause 5, in the same ratio if the sales exceeded the basis just named. An equation was substituted for the specified net loss, and this was done avowedly to avoid disputes and to simplify adjustments; and this equivalent statement simply declares that a gross loss which, after 25 per cent. of it shall be deducted from it, will equal the net loss, shall be the measure of the initial loss. In this case it is the sum of $10,000, because the sum of $10,000, less 25 per cent. of $10,000, or $2,500, is equal to $7,500. All sums collected on the debts forming this gross loss are to be retained by the indemnified, and go to reduce the amount of the initial loss, and all sums collected on the debts which make up the liability of the indemnitor belong to the latter, and diminish the total of its loss. But at what period of time is the adjustment of the gross initial loss, and therefore the ascertainment of the indemnity company's proportion of the whole loss, to be determined? Is it when and as each loss occurs, or is it only when the bond expires? The answer to these questions will settle another issue upon which the parties differ most radically.

On the part of the plaintiffs it is insisted that the initial gross loss of $10,000 is to be determined as of the dates of the failures which first occur, and that the sums due at the date of failure are alone to be reckoned, without abatement on account of payments subsequently made; while the company contends that the time for computing this gross loss is the time when the liability under the bond is to be adjusted,—that is, as of the date of the expiration of its term,—and that the sums then due are the amounts to be considered. There are two proofs of loss required to be submitted,—one, under clause 4, within 20 days after knowledge of the insolvency of any debtor has been received by the indemnified; the other, a final proof of loss under clause "c," within 20 days after the expiration of the bond. It is declared in clause "c" that "the amount due by this company under final proof of loss shall be adjusted and paid within sixty days after receipt by the company of such final proof of loss." The amount due by the company is the amount ascertained under the final proof of loss. That amount is dependent on the amount of the initial gross loss sustained. If the initial gross loss sustained is less than the initial gross loss named in the bond, then there is no loss in excess of the initial gross loss, and consequently no loss for which the company is liable. So

the company's liability can only be ascertained when the initial gross loss has been reached, and, as the company's liability is referable to the final proof of loss, necessarily the ascertainment of the initial gross loss which fixes that of the company must also be referable to the same period. This is made so clear by the learned judge who heard the case below that we quote from his opinion, as follows: "In the preliminary proof, the whole amount due on any claim at the time of failure is to be stated; in the final proof, which covers all claim, the indemnified is required, both as to claims which go to make up the initial gross loss, and those which make up the loss which the company must bear, to state again the whole original indebtedness, and also all amounts paid since the date of failure on each claim. The requirements of proof apply to each class of claims. See Jaeckel v. Indemnity Co. (Sup.), 54 N. Y. Supp. 505. It is conceded that the liability of the company on the excess over the initial loss borne by the indemnified is reduced by payments made between the date of insolvency and the expiration of the bond, and I think the same rule should apply in ascertaining the initial gross loss. If not, why is the indemnified required to make a statement in his final proof of all payments made on claims which go to make up his initial gross loss? The condition relied on by plaintiffs, which provides that the claims 'making up' the initial gross loss shall remain the property of the indemnified, does not help us to dispose of the point now considered. The question still remains, what claims make up the initial gross loss? The loss must be made up of claims as they exist when it is made up, and so we come back to the question, when is it to be made up? If the plaintiffs be right, such a case as this may easily be imagined. For instance, early in the year some debtor fails owing the indemnified party $10,000. By the end of the year the whole debt has been paid off. In such a case, under the construction of the plaintiffs, the indemnified would have the right to hold the company for losses in excess of this $10,000, without having himself borne an initial loss of one dollar. The case put for illustration is not altogether imaginary, nor at all impossible. The very facts suggested hypothetically have actually occurred in the case of one claim involved in this suit. The whole debt due by McMurray at the time of his failure was paid off before the bond expired, and yet the plaintiffs claim that the full amount of this debt should be

counted in making up their initial loss, although nothing has been lost on it. I cannot accept a construction that would lead to such a result, nor can I see how condition 12a operates to fix one time for computing the initial gross loss, when condition 12c provided another for adjusting the company's liability. The time for computing the initial gross loss is, in my opinion, the time when the liability under the bond is to be adjusted—that is, as of the date of the expiration of its term,—and therefore all these intermediate payments must be deducted."

As the company's liability does not begin until the initial gross loss has been sustained, it would seem to follow necessarily that this gross loss, which is the first to be borne, should be made up by those losses that first occur; and it equally follows that those payments which the indemnified is entitled to retain in reduction of his initial gross loss are those which are made after the time for adjustment, upon claims included in the initial loss, while the payments which the company is entitled to receive in reduction of its loss are those made after the same period on debts which form the basis of its liability.

But this does not settle by any means all points of difference between the parties. There is a stipulation affixed to the bond, and that stipulation, which is called a "rider," has caused much of the controversy. The rider is in these words: "In consideration of the lapsing of certificate No. 1,204 in the United States Credit System Company of Newark, N. J., it is agreed that any losses which occur subsequent to the expiration of said certificate, and which would be provable under a renewal of said certificate, may be proved hereunder, in accordance with the terms and conditions of this bond, provided that no claim under extension at the time of payment of the premium shall be included in the protection under this bond." Under certificate No. 1,204, the United States Credit System Company agreed to pay Strouse & Bro. a sum not exceeding $20,000 in excess of $6,250 on the total gross sales and shipments of merchandise made between June 1, 1892, and May 31, 1893, as said Strouse & Bro. may actually lose on such shipments on legally ascertained insolvent debtors whose insolvency occurred after the payment of the guaranty fee, and who had a certain credit rating in R. G. Dun & Co.'s books, and whose debts did not exceed $5,000 for any one debtor. It was further stipulated that 12½ per cent. of the amount due, and all amounts procured

and procurable, shall be deducted from all claims. By a further provision in the certificate, it was stipulated that the $6,250 mentioned in the certificate was the amount of the initial loss first to be borne by the indemnified before the liability of the credit system company would arise. Now, the question is, does the rider carry into the bond all the terms and conditions of certificate No. 1,204?

It will be observed that by the explicit words of the rider any losses which occur subsequent to the expiration of the certificate,—that is, subsequent to May 31, 1893,—and which would be provable under a renewal of the certificate, may be proved under the bond, in accordance with the terms and conditions of the bond. The certificate covered sales and shipments from June 1, 1892, to May 31, 1893; the bond covered sales and shipments from June 1, 1893, to May 31, 1894. The two together embraced the sales and shipments for two years. If the terms and conditions of the certificate are not carried into the bond, then the company would be liable for the losses of two years, though it could not insist upon an allowance of an initial loss for more than one year. The learned judge below decided that the initial loss of $10,000 fixed by clause 12a of the bond was the only initial loss which could be charged to the indemnified, and that the initial loss of $6,250 prescribed by the certificate, and applicable to sales made during the year preceding the date of the bond, but under the protection of the certificate, was not imported by the rider into the bond at all. In effect, therefore, the $10,000 gross initial loss, which was, according to clause 12a, "the agreed amount of annual net loss," becomes, not the equivalent of an annual net loss, but the gross loss for two years. Is this the meaning of the rider? "Losses which occur subsequently to the expiration of said certificate, and which would be provable under a renewal of said certificate, may be proved hereunder, in accordance with the terms and conditions of this bond." This clause relates to two subjects: First, the thing to be proved; second, the mode of proving it. Now, the thing to be proved is not merely a loss, but a particular loss; that is, a loss which would be a loss provable under a renewal of certificate No. 1,204. Then to certificate No. 1,204 resort must be had to ascertain what losses occurring subsequent to its expiration would be provable under a renewal of it. A renewal of it would be simply an extension of it, with all of its terms and conditions.

Upon turning to it, this provision will be found: "Covered losses occurring after this certificate expires on shipments made during its term are provable under the renewal hereof as if the goods had been shipped thereunder." If the goods had been shipped under the renewal of certificate No. 1,204, that is, under a duplicate of it for another year, the thing to be proved—the loss—would have been a loss in excess of the initial loss of \$6,250, and in excess of 12½ per cent. of the claim, and in further excess of all amounts procured and procurable from the debtor, because that residue, and that residue only, would have been the covered loss. The provable debt is the thing to be proved, and, under the terms and conditions of the certificate, only such debts as were in excess of the initial loss and of the abatements just named were losses which the credit system company undertook and stipulated to be liable for. There was a further restriction to the effect that no single indebtedness could be proved for a larger amount than \$5,000. All these conditions and restrictions were descriptive of the thing that could be proved. In the third instruction given by the court, all of these conditions, save the one respecting an initial loss, are conceded to be imported into the definition of losses covered by the rider. The initial loss condition is just as much a part of the description of the loss, and therefore of the debt to be proved, as is either the 12½ per cent. deduction or the limit of \$5,000 upon a single claim. The terms and conditions of the certificate, and not part of them, must determine what are provable losses under the rider, precisely as the terms and conditions of the bond must fix what are provable losses under the bond. American Credit Indemnity Co. v. Athens Woolen Mills, 34 C. C. A. 161, 92 Fed. 581.

Now, the mode of proving the thing to be proved under the rider is a mode which is in accordance with the terms and conditions of the bond; that is, in accordance with the mode prescribed by the bond for the proving of a loss under the bond. It is obvious that there is a wide difference between what loss can be proved and the mode of proving that which may be proved: and, while the mode of proving the loss must be in accordance with the terms and conditions prescribed by the bond for proving a loss under the bond, the loss to be proved under the certificate is such a loss only as the certificate defines. We think, then, the learned judge below was in error when he ruled

that the renewal losses when brought under the bond are on the footing of other losses, and are not subject to any other initial loss than the one provided for by the bond.

The declaration contains two counts. The first is framed on the indemnity bond, and the second on the rider. A large mass of evidence was adduced, most of which was admitted subject to exception, and at the close of the case twenty-five motions were made for the exclusion of much of it. These, save two, were overruled. The first and second bills of exceptions relate to rulings on the admissibility of evidence. The third was taken to the disallowance of the motions to exclude evidence already admitted. As just stated, there were twenty-five of these motions. One, the first, was withdrawn; the second was granted; the thirteenth, fourteenth, and twenty-second have been abandoned; and the remaining twenty are before us. The fourth exception assails the granting of the plaintiffs' fifth prayer. The fifth exception relates to the defendant's prayers. The court granted the defendant's fourteenth, forty-first, and forty-first "a" prayers, and rejected all the others, numbered from 1 to 4, both inclusive, and from 6 to 44, both inclusive, as well as 26, numbered 5a to 5t, and also 12a, 13a, 15a, 20a, and 21a. The fifth exception relates to the defendant's prayers. The sixth exception contains the court's 6 instructions and the 14 special objections to them. The remaining bill of exceptions was reserved by the plaintiffs, and was taken to the refusal of the court to grant the plaintiffs' first four prayers; to the granting of the defendant's fourteenth, forty-first, and forty-first "a" instructions; to the granting of the defendant's second motion excluding evidence; and, finally, to the granting of the instructions given by the court. The bill of particulars, specifying the items of the plaintiffs' demands, sets forth 18 instances of insolvency on the part of that number of debtors who owed the plaintiffs various sums alleged to be within the protection of either the bond or the rider, and the numerous special exceptions, motions, and prayers relate to these different claims. We will classify these exceptions, motions, and prayers, and thus condense them considerably. The trial resulted in a verdict and judgment for the plaintiffs, and both sides have appealed.

The third and fifth bills of exceptions will first be taken up. Treating them together, the following contentions are presented:

First. It is insisted that there is no evidence legally sufficient

to show that the debtors named in the bill of particulars were insolvent, within the meaning of the bond or certificate No. 1,204. This is raised by the 6th, 7th, 11th, 12th, 16th, 17th, 18th, 19th, 21st and 23d motions and by the prayers numbered 8 and 5b to 5t.

Second. It is claimed that there is no evidence legally sufficient to show sales and deliveries of goods, wares, and merchandise by Strouse & Bro. to the various debtors named in the bill of particulars, and especially that there is no such evidence of sales and deliveries to Goldsmith & Co. and Marks, Goldsmith & Co. These points are raised by the 3d, 4th, and 24th motions, and by the 2d, 3d, 4th, 8th, 13th, 17th, 27th, 28th, 29th, 30th, 31st to 38th, 40th, 42d, and 44th prayers.

Third. It is contended that the plaintiffs had no authority to compromise any of the claims included in the bill of particulars. The 9th, 10th, 11th, 12th, 12th "a," 15th, and 15th "a" prayers present this contention.

Fourth. It is asserted that the plaintiffs failed to prove that Goldsmith & Co. and Marks, Goldsmith & Co., debtors of the plaintiffs, were rated in Dun & Co.'s Mercantile Agency Book as required by the bond and by certificate No. 1,204. This is raised by motions 5 and 5a, and by the 20th, 20th "a," 21st, and 21st "a" prayers.

Fifth. It is alleged that there is no evidence of the amount of loss sustained by the plaintiffs on the Goldsmith claims. This is involved in motion 9, and in the 18th and 25th prayers.

Sixth. It is maintained that there is no evidence that Lannon, one of the debtors, died insolvent. The 13th and 13th "a" prayers were drawn to present this point.

Seventh. It is affirmed that sales made prior to June 1, 1893, would not have been provable under a renewal of certificate No. 1,204, and this is the effect of the seventh prayer.

Eighth. It is declared that promissory notes were taken in payment from Goldsmith & Co. Prayer 9 presents this proposition, while prayer 22 proceeds upon the hypothesis that the accounts due by Goldsmith & Co. and by Marks, Goldsmith & Co. were under extension when the premiums on the indemnity bond were paid, and prayer 43 relates to an alleged increase in the length of the credit given these same firms.

Ninth. Prayer 25 sought to exclude all losses on sales made prior to June 1, 1892, but it was rejected because in point of

fact no sales made before that date were included in any of the claims mentioned in the bill of particulars. The transactions to which the prayer had relation were not sales, for the sales were negotiated and concluded later, and clearly fell within the protection of the rider. Nothing more need be said concerning this prayer.

First, then, as to the question of insolvency. What has been said in an earlier part of this opinion on that subject need not be repeated. Clauses 11a and 11b, indorsed on the bond, are not intended, as has been pointed out, to constitute a definition of "insolvency," or to restrict insolvency to the acts therein named. As there was ample evidence tending to show that the debtors designated in the prayers and motions grouped under this division were unable to pay their debts as they fell due in the ordinary course of business, there was no error in overruling those motions and in rejecting those prayers.

Second, with regard to sales and deliveries. It was shown by the salesman who took the orders for goods from the various debtors that the orders were taken, and were then forwarded to the plaintiffs. These orders first went to the stock department, then to the shipping department, where they were entered in the order book, and then they went to the shipping clerk, who shipped the goods, and charged them up in the shipping book. It was shown by the shipping clerk that he saw the goods which are charged to these debtors properly packed; that he superintended the men who nailed and strapped the cases; that he saw these cases marked, made out the bills of lading, and mailed them to the customers, with the invoices attached thereto. He further testified that he made the entries in the sales book at the same time he made the shipments; that after the goods were packed and marked he issued the bill of lading, and had the drayman take it, and bring it back signed; and that the same evening the signed bill of lading, with the invoice pinned to it, was mailed by himself. These bills of lading, with the invoices attached, were mailed in envelopes bearing the monogram and residence of the plaintiffs, and, though other letters thus enclosed had come back through the mails to the house, none of the bills of lading and invoices thus mailed to the debtors named in the bill of particulars were ever returned. It was further shown that some of the debtors made payments on account of these very shipments, while others

sent back small articles included in the goods shipped to them. All shipments were made by common carriers. These circumstances were competent evidence to go to the jury, as they tended to prove sales, shipments, deliveries, and acceptance. Whart. Ev. § 1140. "Should the contract of purchase be silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier, in the usual and ordinary course of business, transfers the property to the vendee." Magruder v. Gage, 33 Md. 344. In addition to what has just been said, there must be a more particular reference to the sales made to Goldsmith & Co. and to Marks, Goldsmith & Co. Louis Goldsmith lived in Baltimore. He carried on business in Spokane, Butte, and Salt Lake as Goldsmith & Co., and, with Isidor Marks as a co-partner, he was engaged in business at Ogden. This firm was known as Marks, Goldsmith & Co. All the goods purchased from the plaintiffs for these four houses were bought by Louis Goldsmith in Baltimore, and, while charged to Goldsmith & Co., the house for which they were designed was designated on the ledger. Marks was not a partner in the Spokane, Butte, or Salt Lake business. When Goldsmith & Co. and Marks, Goldsmith & Co. failed, Marks executed an assignment in the firm name; and the twenty-third motion of the defendant is to the effect that this was not a valid assignment, because only signed by one member of the firm. This objection becomes immaterial, since it is founded on the assumption that insolvency can only be proved by a general assignment, or in one of the other three ways named in clause 11a; whereas, we hold the contrary, and have already ruled that there was sufficient evidence of insolvency to go to the jury independently of any assignment. While there is evidence tending to show that Marks, Goldsmith & Co. was a distinct concern from Goldsmith & Co., there is also evidence from which it might be inferred that they were one and the same debtor. But it is not the province of the court to decide which contention is correct. That was the matter for the jury. Much of the argument in this court was intended to convince us of the identity of these two concerns, and it was insisted that as Louis Goldsmith was in fact the real debtor, and owed the whole amount charged in separate sums in the bill of particulars against Goldsmith & Co. and Marks, Goldsmith & Co., the excess of the total indebtedness over the limit of $5,000 allowed for any one debtor, under certificate No. 1,204, could not

be proved at all. But it is obvious that the question of fact as to whether the two concerns were identical or were independent is not a question for us to decide, nor was it one for the court below to determine; for it was exclusively an issue of fact for the jury. Upon appropriate hypotheses, these conflicting views could have been referred to the jury, but it is not the province of the court to say which of two contradictory contentions of fact is true. There was therefore no error committed in any of the rulings on the prayers and motions grouped under the second head.

Third. There is nothing in the bond or certificate to show that the plaintiffs had no authority to compromise any claim, and there is not the slightest evidence to indicate that any injury was done the defendant by any settlement which was made. The result of the compromise was a diminution of the defendant's liability, and, without presenting any evidence to indicate that more money would have or could have been secured from the debtor than was obtained by the compromise, it cannot insist that it is relieved of responsibility merely because some claims were adjusted by compromise. There was no error in rejecting the prayers relating to this subject.

Fourth. There was evidence sufficient to go to the jury on the question of the commercial rating of Goldsmith & Co. and Marks, Goldsmith & Co. The record shows that in the R. G. Dun & Co. Mercantile Agency Book, under the head "Baltimore," Goldsmith & Co. were rated "C 2," one of the ratings within both the bond and the certificate. Under the headings "Spokane," "Butte," and "Salt Lake," Goldsmith & Co. appear, and beneath their firm name is entered, "See Baltimore, Md." Under the heading "Ogden," is found Marks, Goldsmith & Co., and beneath the name is the entry, "See Baltimore, Md." These entries, "See Baltimore, Md.," were in fact repetitions of the rating given Goldsmith & Co. under the Baltimore heading. The motions and prayers raising this objection were properly denied.

Fifth. There was sufficient evidence to go to the jury upon the question of the amount of the loss sustained by the failure of the Goldsmith concerns, and it would have been error to grant the motion or the prayers which sought to withdraw that question from the jury.

Sixth. There was evidence that Lannon died July 17, 1893,

and that his estate was settled by the Nashville Trust Company as administrator, and that the estate paid 52.16 1-3 per cent. dividend.

Seventh. By the explicit terms of the rider, losses arising out of sales which were made prior to June 1, 1893, and which would have been provable under a renewal of certificate No. 1,204, were provable under the rider, and there were just such claims included in the bill of particulars and established by the evidence.

Eighth. There is absolutely no evidence that notes were taken by Strouse & Bro. in payment of the indebtedness of Goldsmith & Co. or of Marks, Goldsmith & Co. When Goldsmith went to make his purchases for the spring of 1893, he owed the plaintiffs for goods previously shipped to the four Goldsmith establishments over $18,000 on open accounts which would be due on June 1, 1893. The plaintiffs, wishing the business of each season to be closed, required Goldsmith to give notes maturing in the fall of 1893 for the 1892 indebtedness. This was simply changing the evidence of the indebtedness from an open account to promissory notes, and was not an "extension," within the meaning of that term as used in the provision of certificate No. 1,204, which declares that "losses on claims under extension at time of payment of the guaranty fee . . . shall not be included in the calculation of losses." Nor was this transaction an extension under a similar provision in the rider. As used in the certificate and in the rider, "extension" signifies "an agreement made between a debtor and his creditors, by which the latter, in order to enable the former, embarrassed in his circumstances, to retrieve his standing, agree to wait for a definite length of time after their several claims should become due and payable before they will demand payment." Bouv. Law Dict. 503, "Extension." Requiring notes to be given as evidence of the antecedent debt, and making the notes payable at a later date than the open account would have become due, did not constitute an extension, and did not transgress any provision of the bond.

These observations dispose of all the questions raised by the motions to exclude evidence and by the rejected prayers of the defendant, and, as we find no errors in the action taken by the court in regard to these motions and prayers, its rulings in the third and fifth bills of exception are affirmed.

The first and second exceptions relate to the admissibility of evidence. The first is not very clear; that is, the precise ruling

excepted to is not made apparent, and was not alluded to in the argument. The second challenges the ruling which allowed an examination into matters of account appearing on the ledger, the same subject having been previously gone into on cross-examination by the defendant. The plaintiffs clearly had a right to interrogate the witness on the matter thus developed by the defendant. These rulings are affirmed.

The fourth exception concerns the granting of the plaintiffs' fifth prayer. This prayer defined the right of the plaintiffs to make compromises with their debtors. What has been said in disposing of the defendant's prayers Nos. 9, 10, 11, 12, 12a, 15, and 15a is sufficient to show that the ruling complained of in this exception is correct.

The sixth exception contains the court's instructions, and the defendant's fourteen special objections to them. The first and second instructions would be free from error if they related solely to the bond, and did not include losses recoverable under the rider. In so far as they fix the initial gross loss under the bond at $10,000, and prescribe how and at what time the gross initial loss is to be ascertained, they are right; but the third instruction clearly indicates that the first and second were designed also to establish the $10,000 initial loss as the only initial loss to be borne by the plaintiffs. Reading the three together, as they must be read because the third is, in terms, made explanatory of the first and second, an inaccurate rule is laid down, and the inaccuracy consists in the exclusion of an initial loss under certificate No. 1,204, which, as we have already pointed out, is brought into the bond by the rider. Had the third instruction further limited the defendant's liability on losses occurring on sales made between June 1, 1892, and May 31, 1893, by imposing on the plaintiffs the initial loss of $6,250 prescribed in the certificate, all three of these instructions would have been sound. The fourth instruction, while right if standing alone, becomes faulty by its connection with the second. The seventh paragraph of the fifth instruction imports into the fifth instruction the erroneous third instruction, and thus vitiates the whole. The first, second, third, fourth, fifth, sixth and eighth paragraphs of the fifth instruction are undoubtedly correct. As the ultimate result of these five instructions, taken as a series, is to enlarge the liability of the defendant by excluding the initial loss stipulated for by certificate No. 1,204, they ought not to have been granted. If amended to in-

clude in an appropriate way that loss, they would fairly present the law of the case. The sixth instruction, which is the converse of the defendant's twenty-second prayer, declares that there was no evidence that the debts due by Goldsmith & Co. were under extension at the time the premium on the bond was paid. This we hold to be right. As we have decided that the first, second, third, fourth and fifth instructions in the sixth bill of exceptions ought to have been rejected for a reason not named in the special objections, we need not consider those objections at all. None of them has relation to the sixth instruction.

The remaining exception is the one taken by the plaintiffs to the refusal of the court to grant their first four prayers; to the granting of the defendant's fourteenth, forty-first and forty-first "a" prayers; its second motion or the exclusion of evidence; and to the granting of the instructions given by the court. The plaintiffs' first prayer was wrong, because it declared that the initial loss of $10,000 must be made up at the time of the insolvencies, instead of at the date of the expiration of the term of the bond. This has already been considered. The first, second, third and fourth prayers were all founded on the theory that the total initial loss under the bond and under the certificate was confined to $10,000. Besides this, the second, third and fourth proceeded upon the erroneous hypothesis of the first as to the time of computing the initial loss.

The granting of the defendant's fourteenth, forty-first, and forty-first "a" prayers furnishes no ground for complaint. The fourteenth instructed the jury that there was no evidence of any loss sustained by the plaintiffs upon sales made to McMurry & Bro. The whole debt due by McMurry when he failed was paid off before the bond expired. There was consequently no loss at all. The two other prayers told the jury that the plaintiffs could not recover any amount in excess of that claimed in the bill of particulars. This is certainly sound. The court, on motion, struck out the testimony of Rosenthal to the effect that when goods were shipped they were at the risk of the buyer. That was a question of law, which depended on the circumstances attending the shipments. The witness could have stated his knowledge as to these circumstances, but not his deduction from them.

In obedience to the requirements of section 19, art. 5, Code, we have passed upon all the questions presented, save and except the 14 special exceptions to the court's instructions, and those have

not been considered because, upon the instructions being declared erroneous, these exceptions became mere moot questions. Because of the errors we have pointed out in the rulings set forth in the sixth bill of exception, the judgment must be reversed, and a new trial is awarded. Judgment reversed, and new trial awarded, the costs above and below to await and follow the final result.

CHAPTER XXII.

TITLE INDEMNITY BONDS.

a. Title Indemnity Bonds are in the nature of insurance policies indemnifying against losses arising from defective titles to real estate.

QUIGLEY v. ST. PAUL TITLE INSURANCE & TRUST CO. 1895.

60 Minn. 275; 62 N. W. Rep. 287.

Appeal from district court, Ramsey county; Hascal R. Brill, Judge.

Canty, J. On the 1st day of July, 1889, one Amelia Kingsley was the owner of a certain city lot in St. Paul, and was then erecting a building thereon, which was not completed for several months thereafter. She procured a loan of $2,200 of plaintiffs' intestate, John O. Quigley, and mortgaged the lot to him to secure the repayment of the same. The mortgage is dated on that day, but was not recorded until October 22, 1889. The business of the defendant corporation is that of insuring titles, and on September 20, 1889, a written application was made to it by Quigley's agent to insure the title of this lot to the extent of the mortgage interest of Quigley therein. The application was accepted, and a policy of insurance dated October 22, 1889, issued to Quigley accordingly. Thereafter Quigley foreclosed the mortgage, and bid the lot in at the foreclosure sale. The time to redeem expired on February 26, 1892. No redemption was made, and Quigley became the owner of the lot. But between October 10, 1889, and April 10,

1890, work and labor of the value of $95 was performed for Mrs. Kingsley in painting the building as a part of the erection of the same. A mechanic's lien was filed therefor. Suit was brought to foreclose the same, in which Quigley was made a party, and a judgment of foreclosure was entered, adjudging the mechanic's lien paramount to the lien of the mortgage. The lot was sold to satisfy the judgment, and the time to redeem from that sale expired on August 18, 1892, and no redemption was made. This divested the title of Quigley which he had acquired under his foreclosure sale nearly six months before. The defendant was duly notified by Quigley of the commencement of the suit, and undertook and conducted the defense of the same in the name of Quigley under the provisions of the policy. The complaint in this action alleges that Quigley was in his lifetime a resident of New York, and that neither he nor these plaintiffs had any knowledge or notice of the entry of said judgment, nor of the sale under it, until after the time to redeem from that sale had expired. The action is brought to recover from defendant as damages the value of the lot,—which is alleged to be $3,200,—on the ground that it was the duty of defendant to indemnify and save harmless Quigley and these plaintiffs from this mechanic's lien, and defendant was negligent in failing to satisfy the lien, and in failing to pay the sum necessary to redeem from the sale under the judgment before the time to redeem from that sale expired, and in failing to notify plaintiffs that it did not intend to redeem, and thereby give plaintiffs an opportunity to do so. The case was tried by the court below without a jury. Judgment was ordered for plaintiffs for $2,200 and interest, and each party made a motion for a new trial, and appeals from an order denying such motion.

1. We will first consider the appeal of the defendant. Said application contains the following provisions: "It is agreed that the following statements are correct and true to the best of the applicant's knowledge and belief, and that any false statements or any suppression of material information shall avoid the said policy. * * * Present value of buildings? $2,800, when completed. Are there any incumbrances on the property; any mortgages, judgments, mechanics' or other liens; * * * any pending or threatened litigations, any of which affect any part of the above property, known to you or rumor-

ed? State fully. Nothing except mtges. of $500 and $500, which are to be satisfied. Are any of said incumbrances, if any, to remain; and which not? Only the $2,200 now insured.'' At the time the application for the insurance was made, no part of the labor or material for which said mechanic's lien was filed had been furnished, but other labor and material had been furnished in doing other portions of the work of constructing the building, and of the amount to be paid for the same there remained unpaid the sum of $1,700, all of which was afterwards paid out of the proceeds of said loan. It is contended by defendant that the amounts due on these unpaid claims constituted mechanics' liens on this lot; that the application warranted the truth of the above-quoted representations, which were false; and that the falsity of the same avoided the policy, even though no loss or prejudice resulted to defendant by reason of the falsity of the representations. In answer to this, we will say that it appears from the recitals in the policy that defendant had full knowledge of the existence of these unpaid claims for labor and material when it issued the policy, and must be held to have waived the false warranty as to them, under the rule laid down in Brandup v. Insurance Co., 27 Minn. 393, 7 N. W. 735, and Wilson v. Insurance Co., 36 Minn. 112, 30 N. W. 401. By the terms of the policy the defendant excepts from its liability the defects and liens set forth in Schedule B of the policy. Among the things so enumerated in Schedule B is, ''(4) Provisions of an agreement between said mortgagors and Joseph M. Lee,'' giving Lee ''a lien on the premises for such sum as may remain unpaid upon the construction of the building on the premises,'' and stating the book and page in the register's office where this agreement is recorded. This agreement was introduced in evidence on the trial. It is dated October 8, 1889, and states that $1,700 then remained due and unpaid ''on account of the construction of said house and appurtenances.'' By its terms, Mrs. Kingsley agrees that Lee shall have a lien on the premises for any sums which he may advance in paying this claim. This reference in the policy to the Lee contract makes that contract and all the statements contained in it a part of the policy, and by issuing the policy knowing these warranted representations to be false, the defendant waived them, and cannot now be heard to say that it intended to issue and deliver, not

a valid policy, but a worthless piece of paper. The order appealed from by defendant should be affirmed.

2. We will next consider plaintiffs' appeal. It appears by the bill of exceptions that on the trial plaintiffs offered to prove that at the time their title to the lot was divested by the expiration of redemption on the mechanic's lien foreclosure, the lot was worth $3,200. Defendant admitted that at that time the lot was worth more than $2,200, and objected to the offer as incompetent and immaterial. On this admission the court sustained the objection, holding that by the terms of the policy the limit of defendant's liability was $2,200, and this ruling is assigned as error. We are of the opinion that this assignment of error is well taken. The policy, by its terms, limits the liability of the defendant for loss on account of certain kinds of defects and incumbrances to $2,200. But this limitation on its liability does not apply where the loss is caused by its own negligence in the performance of duties which it assumes to perform under the contract. The following are all the parts of the policy which we deem material on the question now under consideration: The defendant, "in consideration of the sum of $2,200 to it paid, doth hereby covenant that it will for the period of 25 years from the date hereof indemnify, keep harmless, and insure John O. Quigley, New York, the mortgagee named in a certain mortgage executed by Amelia Kingsley, * * * from all loss or damage not exceeding twenty-two hundred dollars, which the said insured shall, during said period of twenty-five years, sustain by reason of defects in the present title of said mortgagors to the real estate or interest described in Schedule A, hereto annexed, or by reason of liens or incumbrances affecting the same at the date hereof, or by reason of any defect apparent of record in the execution or filing for record of said mortgage, excepting only such as are set forth in Schedule B; subject to the conditions and stipulations hereinafter contained, and, together with said schedules, made a part of this policy." Attached to the policy, and made a part of the same, are, among others, the following stipulations and conditions:

"(1.) This company will, at its own cost and charge, defend the insured in all actions of ejectment or other proceedings founded upon a claim of title or incumbrance prior in date to this policy, and not herein and in Schedule B excepted; re-

serving, nevertheless, the option of settling the claim, or of paying the amount of its liability at that time under this policy; and payment, or tender of payment, of such amount shall determine all liability of the company under such claim. In case any such action or proceeding is begun, it shall be the duty of the insured to notify the company thereof in writing, within ten days after service of the summons therein, and secure to it the right to defend the action or proceeding, and to give all possible assistance therein; but such defense by the company shall not change or alter the rights or obligations of any of the parties hereto. If such notice shall not be so given, and such right to defend be secured to the company in such action or proceeding, then this policy shall be void."

"(3) As long as the interest of the insured in said real estate consists of a mortgagee's interest and subject to redemption, the company may, at its option, at any time, if it shall deem such action necessary for its protection under this policy, pay the amount then remaining unpaid on said mortgage, and in that case the mortgagee or his assigns shall, by proper instrument, assign to this company said mortgage, together with the indebtedness secured thereby, or the proportion thereof remaining unpaid."

"(5) No right of action shall accrue under this policy * * * until the insured (unless absolved by the company) has, at the company's option, either assigned or conveyed, or in writing agreed on demand to assign and convey, to the company, or such person as it may name, all the right, title, and interest of the insured in and to said above-described real estate or interest, at the following price, viz.: (a) As long as the interest of the insured shall continue to be a mortgagee's interest, or still subject to redemption, the price to be paid shall be the amount then remaining unpaid on said mortgage indebtedness, or the amount necessary to permit such redemption. (b) If the interest of the insured shall by foreclosure and the expiration of the period of redemption have matured into an ownership in fee simple, the price to be paid, unless determined by mutual agreement, shall be the amount bid at said foreclosure sale, with interest thereon at legal rate from the date of such foreclosure sale, together with any and all subsequent expenditures by the insured for improvements, taxes, or assessments on said real estate, with interest at the legal rate on

each of such expenditures from the date of the making thereof, less any sum or sums received by said insured from any partial redemption or sale of said real estate. (c) Any payment under this policy, whether made as the consideration of any such assignment or conveyance as aforesaid or otherwise, shall reduce the liability of the company hereunder by the amount of such payment."

"(7) Claim under this policy having been settled, the company shall be subrogated to all rights of action and remedies for recovery; and the insured hereby assigns and warrants to the company such rights, and agrees that his name may be used in all lawful proceedings therefor. If the payment does not cover the loss of the insured, the company shall be interested in such rights with the insured in the proportion of the amount paid to the amount of the loss not hereby covered; and the insured warrants that such rights of subrogation shall vest in the company, unaffected by any act of the insured."

It will be seen by an examination of the provisions in the body of the policy, above quoted, that the defendant agreed to indemnify, save harmless, and insure Quigley against loss from three different causes: (1) "Defects in the present title;" (2) "liens or incumbrances affecting the same at the date hereof;" (3) "any defect apparent of record in the execution or filing for record of said mortgage." Its liability for loss from these three causes is expressly limited to $2,200, and the insured has a right to recover that amount of loss arising from any or all of these three causes alone, and this fairly implies that, if his loss arises from some other cause besides these three this limitation does not cover it also. In this case, it is claimed that his loss does, at least in part, arise from some other cause, to wit, that of the negligence of defendant. Under said section or subdivision 1 of the stipulations and conditions attached to the policy, the defendant has the option to defend the suit, or pay the claim on which suit is brought, or pay the insured the amount of its liability under the policy. If it elects to defend the suit, it must be held to do so for its own benefit, and must exercise reasonable care; if it fails to do so, it is liable for any loss caused by such failure, and the limitation above quoted does not apply. Neither does the provision, "but such defense by the company shall not change or alter the rights or obligations of any of the parties hereto," contained in said

section 1, relieve the company from liability for its negligence, but it also implies that such defense will be conducted with reasonable care, and must be read as if that condition was expressly attached to it. Even if the claim on which the suit was brought was one against which defendant had not insured the title, and against which it was not obliged to defend, still, if it voluntarily undertook to indemnify the insured, and defend the suit for him, it would be obliged to use reasonable care, and would be liable for its negligence or misconduct by reason of which he was misled and injured. It may be proper here to remark that no claim is made that the lien in question is not covered by the policy of insurance. Neither is it claimed that subdivision or section 5 above quoted in any manner limits the amount of recovery, and we cannot see that its provisions have any other effect than that of creating a condition precedent to the commencement of the action. It certainly cannot be held that the option there provided for must be held open so as to give the insurer a chance to speculate on the amount of the verdict, and accept the option afterwards if more favorable to him than the verdict. Neither would the prices there provided for be in any sense the measure of damages. We are of the opinion that it was error to exclude the testimony offered.

The court also excluded the affidavit of one Stevens, who was an officer of the defendant corporation, and who was acting within the apparent scope of his authority when he made the affidavit, in which he set out the reasons why defendant failed to redeem the lot from the mechanic's lien foreclosure sale. The evidence was competent as an admission tending to prove negligence on the part of the defendant, and it should have been received. This disposes of the case. The order denying defendant's motion for a new trial is affirmed, and the order denying plaintiffs' motion for a new trial is reversed, and a new trial is granted.

End.

BARTON v. WEST JERSEY TITLE & GUARANTY CO.
1899.

64 N. J. L. 24; 44 Atl. Rep. 871.

Action by James M. Barton against the West Jersey Title & Guaranty Company. Demurrer to the declaration sustained.

Argued June term, 1899, before MAGIE, C. J., and VAN SYCKEL, GARRISON and LIPPINCOTT, JJ.

MAGIE, C. J. This is an action on contract in the nature of an action on covenant upon a sealed policy of insurance of the title to certain lands of the plaintiff. The declaration sets up the contract contained in the policy, but as the pleader has annexed to the declaration a copy of the policy, and referred to it so that it has become part of the record, it will be convenient to consider the contract itself, rather than the statements of the declaration in respect to it. Defendant has interposed a demurrer to the declaration, and, upon demand, has served plaintiff with various specifications of the causes on which it rests its demurrer.

It is not deemed necessary to consider any of the causes except the second, which asserts that the declaration does not set out the breach of the covenant declared upon, because the declaration in that respect is plainly insufficient. The contract annexed to the declaration is expressed, so far as the matter now under consideration is concerned, in the following terms: "This policy of insurance witnesseth that the West Jersey Title & Guaranty Company in consideration of the sum of ten dollars to it paid by John M. Barton, of city of Philadelphia, in the state of Pennsylvania, covenants that it will indemnify, keep harmless, and insure the said James M. Barton * * * against all loss or damage, not exceeding four thousand dollars, which the said insured shall sustain by reason of defects in or unmarketability of the title of the insured to the estate, mortgage, or interest described in Schedule A, hereto annexed, or against all liens or incumbrances charging the same at the date of this policy; * * * the loss and amount to be ascertained in the manner provided in the said conditions, and to be payable upon compliance by the insured with the stipulation of such conditions and not otherwise." By Schedule A, the interest insured is described as an estate in fee simple, and the

particular tract in which such estate is insured is set out by meets and bounds, and by reference to a recorded title deed. Among the conditions of the policy is the following, viz.: "No claim shall arise under this policy unless the party insured has been actually evicted under an adverse title insured against."

The first contention in support of this cause of demurrer is that, upon the contract thus set out, the declaration, if intended as the declaration in this case clearly is, to base the action on a breach of covenant arising from the eviction of the insured from the insured premises, must assert an eviction under a paramount title, by due process of law. The notion that such an eviction was essential to establish a cause of action upon a covenant of warranty was repudiated in this court in Kellog v. Platt, 33 N. J. Law, 328. It was there held, in conformity with the previous decision in Carter v. Denman's Ex'rs, 23 N. J. Law, 260, that an action on that covenant could be maintained upon a disturbance of title or possession by a paramount title tantamount to eviction.

But it is contended, with no little force, that the covenant in this policy differs from a covenant of warranty, and that the doctrine applied to the latter is not applicable to the former. The contention is put on the express exclusion of any claim under the policy unless the insured has been actually evicted under an adverse title. It derives its force from a comparison of this clause of the paragraph with the provision of condition 7, whereby the company agrees, at its own cost to defend the insured in any action of ejectment founded on a claim of title insured against, and requiring the insured to notify the company of the action, and to give it an opportunity to defend it. It is also thereby provided that, unless the insured notifies the company within five days after the service of the writ in the action, the insurance shall be void. If this is the correct construction of the contract contained in the policy, the declaration is obviously insufficient, as it contains no assertion of an eviction by due process of law.

But it is deemed unnecessary to express an opinion upon the contract in that respect. Assuming that the covenant in question would be broken by such an eviction as would give rise to a right of action on a covenant of warranty, viz., a disturbance of title or possession by paramount title equivalent to an eviction, the declaration is equally deficient. The deficiency occurs

because there is a total failure to aver that the disturbance and eviction of plaintiff was by a paramount and superior title. The assertion of the declaration is that the West Jersey Sea Shore Railroad Company claimed a lawful right and title to a part of the land the title of which was insured by defendant, and that said company entered and evicted the plaintiff under an adverse title. This does not describe an entry or disturbance by paramount title, and so the breach of the covenant sued upon is not disclosed by the declaration. The defendant is entitled to judgment upon this demurrer.

WHEELER v. REAL ESTATE TITLE INS. & TRUST CO.
1894.

160 Pa. St. 408; 28 Atl. Rep. 849.

Appeal from court of common pleas, Philadelphia county; Bregy, Judge.

MITCHELL, J. The policy was upon a mortgage, and the covenant in it was to indemnify the holder against "all loss * * * by reason of defects or unmarketableness of the title to the estate or interest insured, * * * or because of liens or incumbrances charging the same at the date of this policy." A building was then in process of erection on the mortgaged premises, and is so set forth in the policy. While it was in progress, and for six months afterwards, the possibility of the filing of mechanics' liens, which would relate back to the commencement of the building, and thus antedate the mortgage, created a twofold danger: First, it was a defect in the title which might make it unmarketable as a first incumbrance, and, if the holder was compelled to sell it, he could only do so at a loss; and, secondly, in case of a sale of the property, the mechanics' liens would have priority in the distribution of the proceeds, and the mortgage might have to bear a deficiency. The covenant already quoted insured against both these losses, but, as the insurer was not willing to undertake the indefinite liability of the first, a clause was added, "saving the defects, liens, or incumbrances excepted in Schedule B." This was clearly a restriction of the liability previously assumed, and

was not intended to create any new liability of its own. Turning to Schedule B, we find that it sets out "defects or objections to title, and liens, charges, and incumbrances thereon, which do or may now exist, and against which the company does not agree to insure;" and, first, "unmarketability by reason of the possibility of mechanics' and municipal liens is excepted from insurance." Possibility of liens, to affect marketability, must, of course, be a present possibility. A future possibility of liens can never be escaped in any case, and therefore cannot make a title unmarketable. But "actual losses by reason of such liens * * * are insured against," and "such liens" are those already referred to, those having a present possibility. The meaning of this language does not admit of doubt. The main covenant includes several classes of liabilities. Schedule B excepts one class,—unmarketability by reason of possibility of liens,—but, by an exception to the exception, prevents the exclusion of actual losses by such liens; that is, should a mechanic's lien intervene, the insurer will not indemnify for the loss from the unmarketability of the mortgage thereby caused, but will make good any actual loss, such as the deficiency of the fund to satisfy the mortgage after payment of the lien. The general intent and effect of the whole policy were to insure the mortgage as a valid security both as to title and incumbrances. As to title, all defects were included, except the one of unmarketability by reason of possibility of liens. As to liens or incumbrances, only those were included which come under either—First, the main covenant (those actually charging the property at the date of the policy); or, secondly, under Schedule B, mechanics' or municipal claims "which do or may now exist" at the same date, to wit, inchoate mechanics' liens, which, though not yet in actual existence, may, within six months of the completion of the building, spring up, and acquire an existence as of a date prior to the policy. Not until, by the lapse of time, the danger of such liens should be passed, would the mortgage be secure as a first incumbrance. Before so secure, there was the danger, not only of mechanics', but also of municipal, liens intervening. The latter were therefore classed with the former, and actual loss by reason of either was insured against. But there is no covenant or language indicating any intent to go beyond that limit of time, and to assume a general liability to indemnify against

possible future incumbrances, municipal or other. The policy was executed in 1888. The municipal work for which the claims in question were filed was not done till 1891. Such claims were neither a charge on the property at the date of the policy, nor became so within the period provided for in Schedule B. They were not within the policy at all, and created no cause of action under it.

Judgment reversed.

PLACE v. ST. PAUL TITLE INSURANCE & TRUST CO. 1897.

67 Minn. 126; 69 N. W. Rep. 707; 64 Am. St. Rep. 404.

Appeal from district court, Ramsey county; Hascal R. Brill, Judge.

COLLINS, J. Two questions only are presented by this appeal, both dependent upon the construction to be placed upon language used in a title insurance policy issued by defendant company to plaintiffs as mortgagees of certain real property. The contract, as stated in the policy, was, among other things, to indemnify, keep harmless, and insure plaintiffs from all loss or damage, not to exceed a stated sum of money, sustained by reason of defects in the title of the mortgagors in the mortgaged estate, excepting such as were set forth in an attached schedule, and subject, also, to the stipulations and conditions made a part of the policy. In the schedule an item, stated as "Tenancy of the present occupants," was mentioned as a defect in or objection to the title against which the company did not insure; and among the stipulations and conditions of the policy was one that "no right of action shall accrue under this policy (1) unless the insured, or those claiming under him as aforesaid, shall have been actually evicted under an adverse title not mentioned or referred to in the above Schedule B, (2) or unless there has been a final judgment upon a lien or incumbrance not mentioned or referred to in said Schedule B, under which the title of the insured will be divested by sale under judgment or foreclosure, (3) or unless the insured has contracted to sell the estate or interest insured, and the title has been declared, by a court of last resort of competent jurisdiction, defective or incumber-

ed by reason of a defect or incumbrance for which the company would be liable under this policy." From the complaint it appeared that, at a foreclosure sale of the mortgaged premises, the plaintiffs purchased the same for the full amount due on the debt; that no redemption had been made within the statutory period; that, at the date the mortgage was delivered, and when the policy was issued, the mortgagors were not the owners, in fee or otherwise, of a portion of the mortgaged premises, nor were they in possession, but, to the contrary, said portion was then, and ever since has been, owned and in the actual adverse possession and occupancy of other persons; and that, prior to the issuance of the policy, the mortgagors had been evicted therefrom.

1. It is the position of defendant's counsel that, from the allegations of this complaint, it appears that the case in hand was expressly excepted from the policy because of the words in the schedule, "Tenancy of the present occupants." If we are to give these words their broadest signification, and construe them without regard to the object or purpose of the contract, or the language used elsewhere, the position would be quite easily sustained; for the broad definition of a "tenant" is one who holds or possesses lands or tenements by any kind of right or title, whether in fee, for life, for years, at will, or otherwise. The persons mentioned in the complaint as having been, and as still continuing in adverse possession, are certainly tenants, within this comprehensive definition. But, when we read the entire policy, and consider its object and alleged purpose,—that it purported to be a contract to indemnify plaintiffs, as mortgagees, against loss or damage sustained by reason of defects in the mortgagors' title; that, if the construction contended for by counsel for the defendant should prevail, it would apply in cases where the entire premises were in the adverse possession of another, as well as those, like the present, where only a part is held adversely, leaving the policy holder remediless when he has actually bought and paid for protection; that, if the design of the defendant was to exclude from its policy all liability as to the title "of the present occupants," it could have said so by simply changing one word of the phrase, "tenancy of the present occupants," which, at most, is ambiguous only; that, where an expression in an insurance policy is of such a character, the

ambiguity is to be construed against the insurer, and in favor of the insured; that the word "tenant" is generally used in a popular sense, and, as mentioned in this sense, according to Webster, "one who has the occupation or temporary possession of lands or tenements whose title is in another; correlative to landlord"; and also that, without a provision of this import, the insurer would probably incur a liability if there were outstanding leases, and the insured could not obtain possession at any moment,—we are decidedly of the opinion that the tenancy mentioned in the schedule was that which has arisen through the occupation of temporary possession of part or all of the premises by those who were tenants, in the popular sense in which that word is used. See Caplis v. Insurance Co., 60 Minn. 376, 62 N. W. 440.

2. As the complaint fails to allege the occurrence of any of the conditions precedent, hereinbefore quoted, as found in the policy, counsel for appellant urge this as another reason why the general demurrer should have been sustained. A final judgment upon a lien or incumbrance certainly has no reference to a case like this. And counsel practically concede that the condition requiring actual eviction under adverse title has no application, for the defect upon which plaintiffs base their cause of action is inability to obtain possession, and entire want of title, and nothing else. It is really admitted by counsel that, if any of these conditions precedent stand in the way of a recovery upon the present complaint, it must be that which prohibits recovery unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or incumbered by reason of a defect or incumbrance for which the company would be liable under the policy. If this condition was intended to apply to a case of this character, it demands of plaintiffs that, with full knowledge of a total want of title to a part of the premises, they find someone upon whom they can impose by entering into a contract to sell that which they do not own, or that they enter into a sham contract of sale, have the vendee refuse to perform, bring a suit against him, and then go through the form of an action which is fictitious from start to finish, and a fraud upon the court in which it is prosecuted. They are either compelled to perpetrate a fraud upon the innocent vendee, or a fraud upon the court in which they

bring the action. We cannot believe that the defendant company ever intended the condition in question to cover a case like this, but, rather, that it was designed to guard against actions for nominal damages, instituted by persons who had ascertained that defects existed in their titles, but whose possession remained undisturbed, and who had suffered no loss. It was an adaptation of the law relating to covenants in a deed, that actual loss must precede actual compensation, to the title insurance business. None of the conditions found in the quoted language apply to a case where not only does another party hold possession of the land adversely to the insured, but the latter has lost it absolutely by reason of a defect in the insured title.

Order affirmed.

FIDELITY & DEPOSIT CO. v. COURTNEY. 1902.

186 U. S. 342; 22 Sup. Ct. Rep. 834.

Statement by Mr. Justice WHITE:

The action below was brought, on February 5, 1898, by Courtney, as receiver of the German National Bank of Louisville, appointed by the Comptroller of the Currency on January 22, 1897, four days after the closing of the bank. Recovery was sought upon a bond of indemnity for $10,000 and renewals thereof, taking effect respectively on June 1, 1894, June 1, 1895, and June 1, 1896. The condition of the bond was to hold the bank harmless against any loss which it might sustain by reason of any fraud committed by Jacob M. McKnight, originally as vice president and later as president of the bank. The sum of $18,742.74 was alleged to have been dishonestly and fraudulently embezzled, and misapplied out of the funds of the bank from July 1, 1894, to January 4, 1897, by McKnight, either as vice president or president, and a statement of the items was embodied in the petition. Due proof of the claim was averred to have been made on July 2, 1897. By answer and amendments thereto the defendant took issue as to the happening of each of the alleged defaults; it averred that McKnight, prior to January 21, 1896, had indulged in speculations in whisky and tobacco and in disreputable and unlawful

habits and pursuits; it further averred that the cashier and teller (one and the same individual), or the vice president of the bank, who became such when McKnight became the president, or the directors thereof, at or about the time of the happening of the defaults, had knowledge of the same, and that the bank condoned the defaults of McKnight for which recovery was sought. In effect, also, it was alleged that there had been a violation of each of the other conditions and stipulations of the bond. The amended answer concluded with the following averment:

"When said bond of June 1, 1894, given by defendant to said bank for the fidelity of said McKnight, as set out in the petition, was renewed for another year on June 1, 1895, to cover the period from that date to June 1, 1896, and was again renewed and continued on June 1, 1896, to cover the period from that date to June 1, 1897, said bank, through an officer other than said McKnight, represented and asserted and certified, with the knowledge of the directors of the said bank, that the books and accounts of said McKnight had been examined by said bank and were then found to be correct in every respect, and that all moneys handled by him had been accounted for up to that time, and that he had performed his duties in an acceptable and satisfactory manner, and that said bank knew of no reason why the guaranty bond executed by this defendant should not be continued; but defendant says that, in fact, said statements, assertions, and certificates were, and each of them was, false and fraudulent, and known by said bank to be false and fraudulent, but the defendant did not know the same to be false or fraudulent, and, on the contrary, the defendant believed and relied on said statements and each of them, and but for said statements, assertions, and certificates, the defendant would not have renewed or continued said bond on June 1, 1895, or June 1, 1896, and the defendant would immediately have canceled and revoked said bond, as it had a right to do, and as the said bank knew it had a right to do. The said bank purposely withheld from the defendant the proper information as to the acts and conduct and accounts of said McKnight, and thus misled and deceived the defendant."

A reply was filed controverting the affirmative allegations of the answer, and the cause was tried to a jury. Various exceptions were taken by the defendant to the exclusion of offered

evidence and to instructions to the jury. A verdict was returned for plaintiff, and from the judgment entered thereon an appeal was taken to the circuit court of appeals for the sixth circuit. That court affirmed the judgment. 43 C. C. A. 331, 103 Fed. 599.

A writ of certiorari was then allowed.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the court:

We shall consider under separate headings the several propositions upon which reliance is placed to demonstrate that error was committed by the trial court.

1. The court erred in admitting in evidence a notice of the default of McKnight given to the surety company by the receiver on February 18, 1897, and in instructing the jury that the requirements in the bond, that immediate notice should be given of a default, was fulfilled by giving notice "as soon as reasonably practicable and with promptness" or "within a reasonable time."

The bank was closed by the Comptroller on January 18, 1897, and the receiver was appointed four days afterwards. The experts employed by the receiver to examine the books of the bank began to discover the defaults of McKnight "about two or three weeks after the bank was closed." The notice by the receiver to the surety company that McKnight was a defaulter was given on February 18, 1897. It follows that the notice was given within ten to seventeen days after the first discovery of a default. Both the trial court and the circuit court of appeals, reviewing numerous authorities, held that the requirement in the bond "that the employer shall immediately give the company notice in writing of the discovery of any default or loss" ought not to receive the construction that it was intended by the parties that notice of a default should be given instantly on the discovery of a default, but that what was meant was that notice should be given within a reasonable time, having in view all the circumstances of the case. In so deciding we think the court did not err. Indeed, this construction of the word "immediate" would seem to be applied in practice, as is illustrated by the bond of indemnity considered in the case of the Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co., 183 U. S. 402, *ante*, 124, 22 Sup. Ct. Rep. 124, where one of the conditions was "that the company shall be

notified in writing of any act on the part of said employee which may involve a loss for which the company is responsible hereunder to the employee immediately or without unreasonable delay.''

A quite recent case, decided by the supreme court of New Hampshire (Ward v. Maryland Casualty Co., 51 Atl. 900), so lucidly states the true construction of the word ''immediate'' as employed in a bond cognate to the one under consideration that we excerpt a passage from the opinion (p. 902):

''The defendants' liability depends in part upon the answer to the question whether the plaintiffs gave them 'immediate' notice in writing of O'Connell's accident, the claim made on account of it, and the suit that was brought to enforce the claim. This involves an ascertainment of the meaning of the word 'immediate' as used in the policy. The word, when relating to time is defined in the Century Dictionary as follows: 'Without any time intervening; without any delay; present; instant; often used, like similar absolute expressions, with less strictness than the literal meaning requires,—as an immediate answer.' It is evident that the word was not used in this contract in its literal sense. It would generally be impossible to give notice in writing of a fact the instant it occurred. It cannot be presumed that the parties intended to introduce into the contract a provision that would render the contract nugatory. As 'immediate' was understood by them, it allowed the intervention of a period of time between the occurrence of the fact and the giving of notice more or less lengthy according to the circumstances. The object of the notice was one of the circumstances to be considered. If it was to enable the defendants to take steps for their protection that must necessarily be taken soon after the occurrence of the fact of which notice was to be given, a briefer time would be required to render the notice immediate according to the understanding of the parties than would be required if the object could be equally well attained after considerable delay. For example, a delay of weeks in giving notice of the commencement of the employee's suit might not prejudice the defendants in preparing for a defense of the action, while a much shorter delay in giving notice of the accident might prevent them from ascertaining the truth about it. The parties intended by the language used that the notice in each case should be given so soon after the fact transpired that,

in view of all the circumstances, it would be reasonably immediate. If a notice is given 'with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay,' it will answer the requirements of the contract. Chamberlain v. New Hampshire F. Ins. Co., 55 N. H. 249, 265, 268; May, Ins. 1st ed. § 462, 14th ed. § 1039, Donahue v. Windsor County Mut. L. Ins. Co., 56 Vt. 375; Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553, 568. Whether the notices were reasonably immediate,—like the kindred question of what is a reasonable time,—are questions of fact that must be determined in the superior court. Tyler v. Webster, 43 N. H. 147, 151; State v. Plaisted, 43 N. H. 413; Chamberlain v. New Hampshire F. Ins. Co., 55 N. H. 265; Austin v. Ricker, 61 N. H. 97; Ela v. Ela, 70 N. H. 163, 165, 46 Atl. 414."

We think the trial court was right in refusing to instruct, as a matter of law, that the notice was not given as soon as reasonably practicable under the circumstances of the case, or without unnecessary delay, and in leaving the jury to determine the question whether the receiver had acted with reasonable promptness in giving the notice.

2. The court erred in instructing the jury that the proof of claim sent to the surety company by the receiver on July 2, 1897, was made "as soon as practicable" after giving of notice of the default of McKnight.

This objection is also without merit. The requirement of the bond was that the employer "shall file with the company his or her claim hereunder, with full particulars thereof as soon as practicable" after the giving of written notice of a default or loss. What was required was not a partial, but a full, statement of all the items of claimed misappropriations on which the right to recover upon the bond was based. The investigation to ascertain the various defaults of McKnight continued after the giving of the preliminary notice of default, and the evidence in the record fails to give any support to the contention that the proof of claim was unreasonably delayed, and was not made as soon as practicable after the full particulars thereof were ascertained.

3. The court erred in instructing the jury that the averments contained in the petition filed by the receiver in an action in attachment against McKnight, brought in a state court of Kentucky, on March 6, 1897, to recover various items

of alleged indebtedness of McKnight to the bank, should be given no effect in their deliberations, as but one of said items was embraced in the present action.

The petition referred to was presumably introduced in evidence on behalf of the defendant, as tending to establish that the proof of claim was not made by the receiver as soon as practicable after the giving of notice that McKnight had been guilty of a default. While the trial judge did not state the reasons which led him to instruct the jury to disregard the statements in the petition, the reason for such action was manifest. The petition counted upon various items, a portion only of which were embraced in the petition in the action on trial, and the fact that the petition in the attachment action showed that when filed the receiver knew of some of the misappropriations of McKnight did not tend to prove that he then had knowledge of all of the defaults of McKnight.

4. The court erred in refusing to permit the defendant to read as evidence to the jury a letter of Edwin Warfield, president of the defendant, and dated May 15, 1896, and addressed to the German National Bank of Louisville, Kentucky, and also the reply of R. E. Reutlinger, the cashier of the said bank, written on May 29, 1896, addressed to the defendant, said letter having been an inquiry by the president of the defendant as to the renewal of the bond of McKnight, and the response being an assurance by the cashier of the bank that McKnight had up to that time performed his duties in an acceptable and satisfactory manner, and he, the cashier, knew of no reason why the bond should not be continued. These letters, it being contended, were erroneously excluded on the ground that it had not appeared from the evidence that there was special authority from the board of directors to the cashier to write the letter of response of May 29, 1896. Further, the court also, it is asserted, erroneously refused to allow the defendant to prove by circumstantial evidence that the board of directors selected the bondsman of McKnight and paid for the bond, and that the said cashier was acting in this matter with the knowledge and for the benefit and with the approval of the board of directors.

We are constrained to the conclusion that error was committed in rejecting the evidence referred to in the foregoing contention. It was competent for the defendant to show that

the bank had concerned itself in and about the obtaining of the bond and renewals in such manner as to cause the transaction to become in effect the business of the bank. The bank had notice from the terms of the original bond that it was issued in reliance upon statements and representations made on its behalf to the surety company, and that, in the ordinary course renewals, which were to be optional with the surety company, might also be based upon further statements to be made on behalf of the bank. Thus, in the original bond, it was recited that "the said employer has delivered to the company a certain statement, it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed." It was a reasonable and proper precaution, in anticipation of a desired renewal, to propound the inquiries which were submitted by the surety company. The inquiry was contained in a written communication, addressed *to the bank,* it was received by the bank, and it was proper to presume that it was delivered to the official who made reply thereto, by authority of the bank, he being the executive officer who was charged with conducting the correspondence of the bank. We think the making of the certificate was an act done in the course of the business of the bank, by an agent dealing with the surety company for and on behalf of the bank. It did not purport to be, nor was it designed to be, the mere personal representation of the individual who filled the office of cashier, but it was an official act, performed on behalf of the bank. The information solicited was such as was proper to be asked of and communicated by the bank, and as the renewal was presumably made upon the faith of the statements contained in the certificate, the bank ought not to be heard, while seeking to obtain the benefits of the stipulations agreed to be performed by the surety, to deny the authority of its officer to make the representations which induced the surety to again bind itself to be answerable for the faithful performance by McKnight of the duties of his employment. Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770. In Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co., 183 U. S. 402, *ante,* 124, 22 Sup. Ct. Rep. 124, this court recognized as binding upon the bank a certificate given by one of its officers embodying replies to questions asked by the guarantee company respecting one of the employees of

the bank, although no proof was introduced that special authority had been conferred upon the officer to make the certificate. Nor does the ruling in American Surety Co. v. Pauly, 170 U. S. 156, 42 L. ed. 985, 18 Sup. Ct. Rep. 561, warrant the claim that it is an authority against the admissibility of the certificate here in question. In the bond considered in the Pauly Case, it was not agreed that the statement of the president, upon which the bond was obtained, should be the basis of the bond. The answers made by the person who was president of the bank to the interrogatories of the surety company were but mere commendations by one individual of another individual, at a time when, as said by the court, "no relations existed between the bank and the surety company." Again, in the Pauly Case, no letter of inquiry was addressed to the bank, unlike the practice pursued with respect to the renewal here in controversy, and the letter, whose contents in the Pauly Case was claimed to be binding on the bank, was written by one who was not charged with the duty of conducting the correspondence of the bank. As held in First Nat. Bank v. Stewart, 114 U. S. 224, 29 L. ed. 101, 5 Sup. Ct. Rep. 845, a communication which on its face evidences that it was written by the cashier of a bank, should not be excluded from the jury as not being an act of the bank, where "it appears with reasonable certainty to have regard to the business of the bank." In the case at bar it is manifest these elements were present and the exclusion of the certificate, as also of the evidence designed to establish that the giving of the certificate was an act done in the course of the business of the bank, was erroneous.

But the fact that error was committed in the particulars just stated does not necessarily lead to a reversal, since the settled doctrine is that, even if error has been committed, yet if it appears clearly from the record that such error was not prejudicial, the judgment cannot be disturbed. Origet v. Hedden, 155 U. S. 228, 235, 39 L. ed. 130, 15 Sup. Ct. Rep. 92; Fidelity Mut. L. Asso. v. Mettler, 185 U. S. 308, *ante,* 662, 22 Sup. Ct. Rep. 662. In order to determine whether prejudice resulted from the rulings referred to, it becomes essential to state the facts as portrayed in the bill of exceptions.

McKnight was for a period of time vice president and subsequently the president of the German National Bank. Any and all claims which may have been asserted in the petition as to

misconduct or default on the part of McKnight prior to the 1st of January, 1896, were abandoned at the trial, and there is nothing in the record to support the contention that anything took place prior to that date which affected the truth of the statement made in the certificate given by the cashier on May 29, 1896. In January, 1896, McKnight was president and a director; Adolph Reutlinger was vice president and a director, and R. E. Reutlinger was cashier and teller of the bank.

On January 14, 1896, the mayor of the city of Louisville died. The vacancy occasioned was to be filled by the municipal council of the city, and McKnight became a candidate for the office. There was an active contest, and the incidents connected with the election became the subject of discussion in the public press and of consequent notoriety in the community. One Edmunds, who was a business partner of McKnight, was a prominent factor in said contest, as representing the interest of McKnight, and Edmunds frequently visited the bank and conferred with McKnight in respect to the contest. Edmunds, on his visits to the bank, "was often seen by and had conversations with the vice president and other directors of the bank, who knew the purpose of his visits." The firm of S. E. Edmunds & Co., composed of McKnight and Edmunds, had an account on the books of the bank. Edmunds, however, had no individual account with the bank.

On January 18, 1896, Edmunds came to the bank, and there drew his personal check on the bank for the sum of $1,000. McKnight directed this check to be cashed, and, as Edmunds wished ten $100 bills for the check, McKnight, in the hearing of the vice president, told the cashier to take $1,000 and go to a neighboring bank and get the denomination of bills desired, which he did, and they were handed over to Edmunds. The check of Edmunds which had been thus cashed, although he had no individual account with the bank, was, by the direction of McKnight, carried by the cashier as a cash item until March 12 following. On the date last named, by the direction of McKnight, the amount was charged to the account of S. E. Edmunds & Co., it not appearing that the effect of this debit was to overdraw this latter account.

It was shown that at the time Edmunds drew this check there was an understanding between himself and McKnight that he, McKnight, should be responsible for the check and see

that it was paid. The money which Edmunds received it was proved was used by him in bribing four members of the city council to vote for McKnight for mayor, and in consideration of the payment, the parties, on receiving the money, signed the following agreement:

"I hereby pledge myself to vote for J. M. McKnight for mayor of the city of Louisville, first, last, and all the time, until elected or defeated before the general council."

There was no proof introduced to show that the officers or directors of the bank, other than McKnight, had any knowledge of the purpose for which the check was drawn or the use which was made of it, unless it be that the fact that they knew that McKnight was a candidate for mayor had a tendency to show that he was engaged in unlawful practices.

On January 21, 1896, to pay his own debt, McKnight drew his individual check (he having an individual account with the bank) for $1,253, to the order of a person to whom he was personally indebted. This check was paid. McKnight instructed the cashier not to have this check charged up, but to carry it as cash, and it was so carried until March 12, 1896, when McKnight directed that the check be debited to the account of S. E. Edmunds & Co., which was done. Subsequently, and prior to the 12th of March, 1896, another check was drawn by McKnight, on his individual account, for $1,650, and was paid and carried by the cashier, by McKnight's direction, as cash, until March 12, 1896, when it was charged up to the Louisville Deposit Collateral account. This latter was an account on the books of the bank of which McKnight had the management and control as president of the bank, but in which he had no personal interest. It was shown that the carrying of these checks by the cashier in his cash as money was called to the attention of the vice president of the bank, who made inquiry on the subject as to why it was done, and was informed that it was done at the request of McKnight, the latter presumably directing the checks to be charged as above stated, in consequence of such inquiry.

McKnight was defeated for mayor. It was matter of common knowledge in Louisville that there was great dissension between the elected mayor and members of the boards of aldermen and councilmen, and that members of the board of aldermen were endeavoring to block legislation proposed by the new

mayor. There was proof tending to show that McKnight fomented this discord, and drew up a paper, which was signed by five aldermen, pledging themselves to be controlled in the performance of their duties by McKnight. Two other signatures, however, were required to get control of the board. McKnight was informed by Edmunds that two aldermen were wavering, and that to obtain their signatures to the agreement it would be necessary to pay each of them $1,000. On February 6, 1896, McKnight requested the cashier to remain at the bank and keep the vault open after the regular time for closing, and said to him that he "had a big scheme on hand, and that it was a big thing." The bank was kept open, and at about half-past six Edmunds brought to the bank the two aldermen in question. Thereupon, in the presence of these two men and the cashier, Edmunds prepared a note, which was then signed by the two aldermen, as follows:

Louisville, Ky., February 6, 1897.

$2,000.00.

One year after date we promise to pay to the order of ourselves two thousand dollars without defalcation, value received, negotiable and payable at German National Bank.

After signing the note, the two aldermen went upstairs, later returned to the bank office, and then received from the cashier, who acted under the instructions of McKnight, the sum of $2,000 in currency.

It was shown that, while upstairs in the bank building, the two aldermen affixed their signatures to the following paper, which had already been signed by five other of the aldermen:

Louisville, Ky., February 5th, 1896.

We do this day and date agree with one another, and bind ourselves on our sacred words and honor, that we will stand together on any and all propositions of legislation that may come before the body of which we are members, namely, the board of aldermen of the city of Louisville; that we will so caucus with our friend J. M. McKnight, and act wisely, and secure for our friends an equal division of the offices and any profit that may arise therefrom; that we, as men and members of the upper board, will not allow the mayor to force upon us any appointments that we do not deem wise and to our interest, and in so doing will not act the first night of a meeting on any proposition sent in by the mayor, but will take one week for consideration and caucus.

Now we have calmly considered the above, and do again pledge ourselves one to the other before subscribing our names this day and date, February 5th, 1896, in the presence of one and the other.

There was no testimony tending to show knowledge on the part of the bank, or any of its officers and directors, other than McKnight, of the purpose for which this $2,000 was paid, or of the relations which existed between McKnight and the men to whom it was paid, unless such knowledge was lawfully inferable from the circumstances above stated and those hereafter mentioned.

On the night of the occurrences above detailed the cashier of the bank went to the residence of his father, the vice president, and told him of the keeping open of the bank that evening and the cashing of the note. The next morning the vice president asked McKnight for an explanation of the matter, and the latter responded that the transaction was all right, and that the note was good, and that it would be guaranteed by men of credit, whom he named. McKnight also said that he would guarantee the payment of the note; that the parties were obliged to have the money that night, and he kept the bank open to let them have it. When this conversation was had McKnight had a long yellow envelope in his hand, and he told the vice president that "he had a document there in his pocket which was signed by those fellows;" that "he had a meeting upstairs and that paper was signed, and he would not sign it for the city of Louisville;" but McKnight did not mention the names of the persons who had signed it. The vice president noticed that the bank was to get no interest on the loan. He informed other members of the board of directors, and shortly afterwards the matter was brought before the board for its consideration. The vice president reported to the board that he had made some investigation and could not find that two aldermen who had signed the note had any property, and he was unable to say whether or not they were good. McKnight made the same statement to the board that he had made to the vice president, though to neither the vice president nor the bank was any explanation made about the interest feature of the transaction. He assured the directors that the note was good. This explanation satisfied the board, and they passed the note. One Jacob Reisch, a director at the time, testified on the wit-

ness stand, however, that some short time after the execution of this note the vice president told him what he had learned about the matter, and said to him, that the money was used in the mayor's race. This latter statement the vice president denied having made. We quote from the bill of exceptions the following statement:

"There was also evidence tending to show that J. M. McKnight was president of the bank, and the other officers of the bank, including the directory, had entire confidence in his honesty and integrity up to the time the bank was closed; that none of them had any knowledge that any act of his, in the management of said bank, was fraudulent or dishonest, until after the closing of the bank; that said bank had a discount committee who regularly examined and passed on the papers of the bank, as required of such committee, and the directory of said bank undertook to make a monthly investigation—sometimes twice a month—of the affairs of said bank, and required the president to go through same with them and make a full report thereon; that some of the directors were in the bank almost daily inspecting its affairs, and that they did at all times observe due and customary supervision over said president for the prevention of default; that none of the officers of said bank, including the directory, had any knowledge of the various checks set up in the petition as fraudulent, and that were charged to the account of the other parties than those drawing them, or on whom they were drawn, except the clerks who charged them up to said account as stated, and there was evidence tending to show that they charged them up to such accounts by the direction of McKnight, the president, and except, further, R. E. Reutlinger, the cashier and teller of said bank, knew of said checks when they came into said bank, and was instructed to hold them as cash items by McKnight, but further than this he had no knowledge [of them]."

Now, with this state of the record in mind, we come to consider the statements in the certificate signed by the cashier, on May 29, 1896, in answer to the letter of the surety company, shortly before the bond was renewed, to determine whether prejudicial error arose from rejecting the certificate. The certificate stated that the president "has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued."

There was certainly proof showing that the action of the president as to the three checks, and the charging them to accounts on the books of the bank, deceived the officers of the bank and caused them to be satisfied with the transactions. Certainly, also, there was uncontradicted evidence establishing that the explanation given by McKnight of the discount of the $2,000 note satisfied the directors. There was no justification in the evidence on these subjects to take the case from the jury and instruct a verdict for the defendant upon the theory that in and of themselves the transactions were of such a character as to preclude the possibility of a belief in the sufficiency of the explanation made by the president, however apparently reasonable those explanations may have been, and however honest may have been the belief in their truth. This being so, it follows that the only basis upon which it could have been found that the bank was dissatisfied was the induction from the facts and circumstances that the bank knew of the fraud which the transactions were intended to effectuate. And this latter view was stated by the court to the jury. Referring to the alleged fraudulent checks and drafts of the president, the court said:

"The mere fact of drawing for more than you have got in the bank without any fraudulent intent in that mere transaction would hardly be a fraudulent act within the meaning of this bond.

"Now, I suppose in this case, if the bank had known that McKnight was making these drafts for these various fraudulent purposes, such as buying up councilmen, buying up aldermen, paying his own personal debts; if the bank had known that and consented to it,—there would not have been a fraudulent act by McKnight for which the bank could recover against this company.

"But if you believe from the evidence that the bank did not know of the fraudulent purposes for which the overdrafts were made, if the overdrafts were made in connection with this matter,—if you believe the bank did not know the fraudulent purposes,—then that changes the result; because if the bank did not know and still consented to it, it would not relieve the act of McKnight from the character of being a fraudulent act. So that, as I view the case—you must remember, however, that you are the sole judges of the evidence in this case and its

credibility—as I view this case, however, there would be no fraudulent acts upon McKnight's part (limiting my observations now to the overdrafts), there would be no fraudulent acts upon his part merely in an overdraft, if there were no fraudulent intent behind it which was concealed from the bank."

Again, the court—referring to the $2,000 note transaction—said:

"If you believe from the evidence that the bank did know of this fraudulent purpose, and that this default of McKnight's, this fraudulent act of McKnight's, in getting these $2,000, was known to the bank at the time, then I instruct you that all of the liability of the defendant in this case would cease then, that being the earliest, or one of the earliest, if not the earliest, of all these transactions. If you believe from the evidence that this transaction was known and condoned by the bank at the time, before these other transactions occurred, then the defendant in this case is not liable."

In other words, reiterating in a somewhat different form the proposition previously stated, if the certificate transmitted by the cashier to the surety company had been received in evidence it would not alone have availed as a defense, because further proof would have been required showing the falsity of the statements contained in the certificate. In view, however, of the uncontradicted testimony tending to show that in the course of the transactions relied upon the president had, either by conduct or explanation, produced the impression on the bank that the transactions were *bona fide,* and therefore relieved the bank from any dissatisfaction as to the transactions, it must follow that the falsity of the certificate could alone have been inferred by concluding either that the transactions in and of themselves were of such a character that, as a matter of law, no explanations made of them by the president could have justified the bank in being satisfied on the subject, or that the surrounding circumstances were such as to authorize the jury to infer that the bank must have known of the fraud, and therefore to find that the bank could not possibly have been satisfied with the conduct of the president. But the first hypothesis we have pointed out was inadmissible. The second was left to the jury to determine, since the charge of the court was that if the jury could deduce from the proof knowledge on

the part of the bank of the fraud of the president, the surety company would not be liable on the bond. As, therefore, the very question which the jury would have been called upon to determine if the certificate had been received in evidence was fully submitted to them and was necessarily negatived by their verdict, no foundation exists for holding that prejudicial error resulted from excluding the certificate.

5. The trial court erred in not instructing the jury that the knowledge possessed by an officer or director of the bank, of the fraudulent purposes of McKnight, though such knowledge had not been communicated to the bank, should be treated as the knowledge of the bank; and also erred in not instructing the jury that the knowledge which any officer or director of the bank might have acquired of the fraudulent conduct of McKnight, if such officer or director had exercised customary supervision, should be imputed to the bank.

The question which these propositions embrace were raised by the exceptions taken to certain portions of the charge to the jury, referred to in the record as instructions Nos. 5, 6, and 7. In instruction No. 5 the court told the jury, in general terms, that the bank, under the stipulations contained in the bond, owed to the surety the duty of exercising due and customary supervision over McKnight to prevent the commission by him of fraudulent acts, and further instructed that if the bank knew of the fraudulent purposes of McKnight in connection with the drafts and checks upon which recovery was sought, the surety would not be liable. Exception was taken to this instruction, on the ground that it "did not submit correctly to the jury consideration of knowledge on the part of the officers or directors of the bank other than McKnight, which they had, or would have had, if customary supervision had been exercised." Instruction No. 6, and the objection made to it, reads as follows:

"I do not think that the knowledge of a cashier of a bank, speaking generally, is the knowledge of the bank as to any matter that does not come within the customary or ordinary duties of a cashier or those which have been specially imposed upon him by the action of the bank. I do not think Mr. R. E. Reutlinger, in this case, in respect to any matter which he knew or could do, represented the bank, if it was outside of his ordinary duties; and I do not recall anything that he knew,

so far as the proof shows, that would in any wise affect the liability of the defendant in this case."

Objection was made to the foregoing portion of the charge, on the ground that the knowledge of the cashier of the acts of McKnight in respect to his overdrafts, his transactions in connection with the $2,000 note signed by the two aldermen and with the checks to Edmunds, and the several checks for McKnight's individual account, was the knowledge of the bank, and that the jury should have been so told.

Instruction No. 7 dealt with the $2,000 note transaction. In effect, the jury were instructed that the knowledge of the cashier acquired in the performance of his duties might be imputed to the bank, but that the vice president or an individual director did not hold such an official relation to the bank as that his knowledge of wrongdoing by McKnight, if not communicated to the bank, could be treated as the knowledge of the bank.

We do not deem it necessary to analyze the instructions given by the court for the purpose of determining whether they were in all respects accurate, because we are of the opinion that if the court in any wise erred it was in giving instructions which were more favorable to the defendant surety than was justified by the principles of law applicable to the case.

It is well settled that, in the absence of express agreement, the surety on a bond given to a corporation, conditioned for the faithful performance by an employee of his duties, is not relieved from liability for a loss within the condition of the bond by reason of the laches or neglect of the board of directors, not amounting to fraud or bad faith, and that the acts of ordinary agents or employees of the indemnified corporation, conniving at or co-operating with the wrongful act of the bonded employee, will not be imputed to the corporation. United States v. Kirkpatrick (1824), 9 Wheat. 720, 736, 6 L. ed. 199, 203; Minor v. Mechanics' Bank (1828), 1 Pet. 46, 7 L. ed. 47; Taylor v. Bank of Kentucky (1829), 2 J. J. Marsh. 564; Amherst Bank v. Root (1841), 2 Met. 522; Louisiana State Bank v. Ledoux (1848), 3 La. Ann. 674; Pittsburg, Ft. W. & C. P. Co. v. Shaeffer (1868), 59 Pa. 350, 356; Atlas Bank v. Brownell (1869), 9 R. I. 168, 11 Am. Rep. 231. The doctrine of these cases is thus epitomized in 59 Pa. 357:

"Corporations can act only by officers and agents. They do

not guarantee to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond, became responsible for the fidelity of their principal. It is no collateral engagement into which they enter, dependent on some contingency or condition different from the engagement of their principal. They become joint obligors with him in the same bond, and with the same condition underwritten. The fact that there were other unfaithful officers and agents of the corporation, who knew and connived at his infidelity, ought not in reason, and does not in law or equity, relieve them from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound. In a suit by a bank against a surety on the cashier's bond, a plea that the cashier's defalcation was known to and connived at by the officers of the bank, was held to be no defense. Taylor v. Bank of Kentucky, 2 J. J. Marsh. 564."

So, also, in 3 La. Ann. 674, the court, after suggesting the distinction between the knowledge of the governing body of a bank, the board of directors, of the default of a bonded employee, and the knowledge of such default by another officer or employee, not communicated to the board, thus tersely stated the applicable doctrine (p. 684):

"It cannot be said that if one servant of a bank neglects his duty, and by his carelessness permits another servant of the bank to commit a fraud, the surety of the fraudulent servant shall be thereby discharged."

And see American Surety Co. v. Pauly, 170 U. S. 156, 157, 42 L. ed. 986, 18 Sup. Ct. Rep. 552, and cases cited. In other words, the principle of law discussed in the case of The Distilled Spirits, 11 Wall. 356, *sub nom.* Harrington v. United States, 20 L. ed. 167, viz., that the knowledge of an agent is in law the knowledge of his principal, is intended for the protection of the other party (actually or constructively) to a transaction for and on account of the principal had with such agent. In the very nature of things, such a principle does not obtain

in favor of a surety who has bonded one officer of a corporation, so as to relieve him from the obligations of his bond, by imputing to the corporation knowledge acquired by another employee subsequent to the execution of the bond (and from negligence or wrongful motives, not disclosed to the corporation), of a wrong committed by the official whose faithful performance of duty was guaranteed by the bond. As the rule of imputation to the principal of the knowledge of an agent does not apply to such a case, it must follow that it can only obtain as a consequence of an express provision of the contract of suretyship. Was there such a provision in the bond now under consideration?

Now the clause of the bond sued on, and as to which the court was instructing the jury in the portions of the charge under consideration, is as follows:

"'That the employer shall observe, or cause to be observed, due and customary supervision over the employee for the prevention of default, and if the employer shall at any time during the currency of this bond condone any act or default upon the part of the employee which would give the employer the right to claim hereunder, and shall continue the employee in his service without written notice to the company, the company shall not be responsible hereunder for any default of the employee which may occur subsequent to such act or default so condoned.'"

Manifestly, this stipulation is not fairly subject to the construction that it was the intention that the neglect or omission of a minority in number of the board of directors or the neglect or omission of subordinate officers or agents of the bank should be treated as the neglect or omission of the bank. The provision is not that a minority in number of the board of directors or that subordinate officers or agents would exercise due and customary supervision, and would not condone a default of the bonded employee or retain him in his employment after the commission of a default, but the agreement is that the bank would do or not do these things. This in reason imports that the things forbidden to be done or agreed to be done were to be either done or left undone by the bank in its corporate capacity, speaking and acting through the representative agents empowered by the charter to do or not to do the things pointed out. To hold to the contrary would imply that the

bond forbade the doing of an act by a person who had not power to perform or commanded performance by one who could not perform. Assuredly, therefore, the conditions embodied in the stipulation to which we have referred, both as to doing and nondoing, contemplated in the reason of things the execution of the duties which the contract imposed on the bank, either by the governing body of the bank, its board of directors, or by a superior officer, such as the president of the bank, having a general power of supervision over the business of the corporation, and vested with the authority to condone the wrongdoing or to discharge a faithless employee. That is to say, the stipulation in all its aspects undoubtedly related to the bank, acting through its board of directors or through an official who, from the nature of his duties, was in effect the vice principal of the bank. The decision in Guarantee Co. of N. A. v. Mechanics' Sav. Bank & T. Co., 183 U. S. 402, *ante*, 124, 22 Sup. Ct. Rep. 124, it may be remarked, in passing, is not antagonistic to the views we have just expressed, because in that case all the information which was held imputable to the bank had been communicated to the president of the bank.

Now, applying the principles previously expounded to the case in hand, it is evident that the court rightly refused to instruct the jury that the mere knowledge of one or more directors, less than a majority of the board, and of the vice president of the bank, of the default of the president, was imputable to the bank. Indeed, as we have previously said, when the charge which the court gave is considered, it is apparent that the court went quite as far as the law warranted, in favor of the defendant, since the court instructed that knowledge acquired by the cashier in the course of the business of the bank, and not communicated by him to the board of directors, should be regarded as the knowledge of the bank.

6. The court of appeals erred in affirming the action of the trial court in instructing the jury that the carelessness of the directors in the management of the bank was not an issue for them to consider.

In considering the clause of the charge to the jury which provided that "due and customary supervision over the employee" should be observed "for the prevention of default," the trial court told the jury that it imported "a reasonable vigilance upon the part of the bank to prevent defaults," that is,

to prevent the commission of fraudulent acts by McKnight. To instruct the jury in broad terms that if they found that the directors were careless in the management of the bank generally they should find for the defendant, could only have served to mislead. The court did not err in refusing the requested instruction.

Judgment affirmed.

Mr. Justice GRAY and Mr. Justice BREWER did not hear the argument, and took no part in the decision of this cause.

End

STENSGAARD v. ST. PAUL REAL ESTATE TITLE INS. CO. 1892.

50 Minn. 429; 52 N. W. Rep. 910.

Appeal from district court, Ramsey county; KELLY, Judge.

GILFILLAN, C. J. This is an action upon a policy issued to plaintiff, insuring the title to real estate. The policy refers to a written application, and provides that "any untrue statement or suppression of a material fact affecting the title, or any untrue answer to questions contained in said above application, by the insured or his agent, shall avoid this policy, excepting as against a mortgagee not privy thereto." The application contains this provision: "It is agreed that the following statements are correct and true, to the best of the applicant's knowledge and belief, and that any false statement or any suppression of material information shall avoid the policy." Then follow questions by the company and answers by the insured, among which was: Question. "Last price paid for the property?" Answer. "$11,000." The application was signed by the insured. The breach in the policy consisted in this. The land belonged to one Uihlein, and immediately prior to the issuance of the policy the plaintiff purchased and received a conveyance from a person whom he supposed to be Uihlein, who, however, was not Uihlein, but falsely personated him and forged the deed, wherefore the plaintiff got no title. The defense was based on the alleged falsity of the above answer, to the knowledge of plaintiff. There is also a counter-

claim based on allegations that after the policy issued the plaintiff issued to a *bona fide* mortgagee, not privy to the false answer, a note for $4,500, and a mortgage on the land to secure it, and as further security assigned the policy to such mortgagee, and that on discovering that plaintiff's deed was forged the defendant paid the note and mortgage, and the same were assigned by the holder to it. The court below determined, in effect, as matter of law, that the above answer was material, and that, if plaintiff knew it to be false, it avoided the policy. The plaintiff insists that it was not material, and that at any rate its materiality was a question of fact to be determined by the jury. In the first place the answer to the question, "Last price paid?" was a statement of fact, and not the expression of an opinion, as a statement of value generally is. In the second place the effect of falsity in the statements on the validity of the contract is not made to depend on the intent with which the statement is made, as that the intent shall be fraudulent, but on whether true or false, to the best of the applicant's knowledge and belief. Where the contract itself does not stipulate the effect that a particular false statement or representation shall have on the contract, or where it stipulates merely that the misrepresentation or suppression of a material fact shall avoid it, the fact misrepresented or suppressed must have been material, as an inducement to enter into the contract; and as the materiality must be shown by matters outside the terms of the contract, it is a question of fact. But the parties may by their contract determine the materiality for themselves, as where they stipulate that if a statement of fact made by one of them, and set forth in the contract, be false, it shall avoid the contract. In such case the statement is in effect a warranty. Whether they have made the statement material, and in effect a warranty, is a question for the court, to be determined by an interpretation of the contract. The court below correctly decided the question in this case.

The "last price" referred to in the application, question and answer, was the price paid by plaintiff to the person who executed the deed to him. The question called for a statement of the actual, and not merely a nominal, price,—of the price in money or money's worth; and from the answer the defendant could understand nothing else but that the sum stated

was the actual money price. The evidence of the plaintiff showed beyond dispute that in the deal with the person who personated Uihlein, and which resulted in the deed to plaintiff, no money price was agreed on; that it was not a sale for money or money's value, but that the plaintiff holding stock in a mining corporation to the amount, par value, of $15,000, but which, as the jury find, was of very little value in the market in St. Paul, where the transaction was had, and find also that plaintiff knew it was of little value, he transferred the stock and paid $3,000 in cash for the conveyance. The consideration stated in the deed was $11,000,—at whose suggestion inserted, does not appear. The actual consideration was the stock, of little value, as plaintiff knew, and the $3,000. It is not a case, as plaintiff contends, of a price agreed on for the land, and a subsequent tender on the one part and acceptance on the other of property in lieu of money, in satisfaction of such price. It was a trade of stock and the $3,000 for the land. The charge of the court that if the $3,000 and the fair market value of the stock in the St. Paul market aggregated $11,000 the jury must find the answer in the application true, and that if, from the evidence, they believed that plaintiff did not know the stock to be of little value, and that he honestly believed he was paying $11,000 in full cash value, and that the other party accepted said cash and stock as and for $11,000 in money, they should find the said answer true, was certainly sufficiently favorable to the plaintiff. If there was any error, in view of the evidence in the case, it was not against him. After the jury retired, they returned into court, and the court reiterated the instructions, of which the substance is above stated; and neither party excepted. Both sides appear to have accepted such instructions as a correct statement of the law on the point. The instructions requested by plaintiff were, so far as they stated the law correctly, and were applicable to the case, and not likely to mislead, given by the court in its general charge. It is unnecessary to go over them in detail, further than to say this: that if in any case the receipt in the deed for $11,000 could be *prima facie* evidence, as against one not a party to the deed, of the payment of that sum as the actual price of the land, yet such *prima facie* effect was so completely overthrown by the plaintiff's own testimony that it would have been idle, and probably misleading, to give the instructions requested.

There is no such presumption as that the stock of a corporation is worth its par or face value. The certificate of stock is not an obligation to pay money, which is presumed to be worth its face, because every one is presumed to be solvent that is to have sufficient property to pay all his debts. It is only evidence that the holder has an interest in the corporation, and its franchises and property, in the proportion that the stock held by him bears to the whole amount of stock; but it is no evidence of the financial standing of the corporation, nor of the value of its franchises and property.

The plaintiff having admitted in his reply that he signed the application, and not having alleged that when signing he did not know, or that he had been deceived as to, its contents, it was, though the answers were written by defendant's secretary, as much his act as though he had written the answers himself. The evidence offered of the conversation at the time between him and the secretary was therefore, if offered to vary the effect of the application, incompetent; if offered for any other purpose, it was immaterial. The application for leave to amend his reply so as to make the evidence offered admissible was addressed to the discretion of the court, and allowing him the benefit of an exception to the ruling of the court on the application, (and all that he can claim upon what was said at the time is that by reason thereof he failed to take an exception,) and it will be of no avail; for we see no reason to think the discretion was not judiciously exercised. To submit any question of fact for a specific finding upon it was wholly in the discretion of the trial court, so it was not error for it to decline to submit the questions prepared by plaintiff.

The note of plaintiff, set up in the answer by defendant as a counterclaim, and upon which a recovery for the full amount thereof and interest is demanded by the answer, was not due, by its terms, till June 22, 1892,—long after the trial. There was no demurrer to the counterclaim. The reply expressly admits the making of the note and mortgage. The note, mortgage, and the assignment to defendant were introduced in evidence by defendant, without objection. The court instructed the jury that, if they found for the plaintiff, they should assess the damages upon the policy and interest, and deduct therefrom the amount of the note and mortgage and interest, and, if they found for defendant, they should render a verdict

for the amount of the note and interest. No exception was taken to these instructions. From first to last of the record there is nothing to suggest that the point was ever made in the court below that the counterclaim could not be allowed because the note was not yet due. We think that, on the contrary, it was assumed, and the cause tried and submitted to the jury, without objection by anybody, on the theory that the counterclaim might be allowed. That being so, the plaintiff waived the objection that the claim to recover on the note was premature.

There are several minor assignments of error, none of them well taken, and none of which need be specifically mentioned.

Judgment affirmed.

CHAPTER XXIII.

RIGHTS OF CORPORATE SURETIES.

a. *Corporate sureties have the same rights under the law as individual sureties.*

MARCH v. FIDELITY & DEPOSIT CO. 1894.

79 Md. 309; 29 Atl. Rep. 521.

Appeal from orphans' court of Baltimore city.

BRYAN, J. The Fidelity & Deposit Company was surety on the administration bond of Philip March, Jr. It filed a petition in the orphans' court of Baltimore city, stating that it conceived that it was in danger of suffering loss by reason of the suretyship, and praying that the administrator might be required to give counter security. After answer by the administrator and a hearing, the court passed an order requiring him to give counter security. The administrator has appealed. Section 1, art. 90, of the Code provides that any security of an executor or administrator who shall conceive himself in danger of suffering from the suretyship may apply to the orphans' court which granted the administration, and the court may require the administrator to give counter secu-

rity. It has been decided that the words of the Code are mandatory, and that they impose a positive and absolute duty on the orphans' court to grant the relief prayed. Sifford v. Morrison, 63 Md. 14. It will be seen that the language of the Code is very comprehensive. It gives the right to proceed in the manner mentioned to "any" security. It includes all, and excludes none. The security in the present case must be entitled to the benefit of this provision of the Code, unless the law has in some way made a special exception against it, and denied to it the rights which belong to securities in general.

We will consider this question. The act of 1890 (chapter 263) conferred on the Fidelity & Deposit Company of Maryland the right to become security for the faithful performance of any trust, office, duty, contract, or agreement; to go on any appeal or other bond; and to "become sole security in all cases where by law two or more sureties are required for the faithful performance of any trust or office." When the statute enabled this corporation to become a surety, it described a relation perfectly well known and understood in law. Certain rights, duties, responsibilities, and functions belong to the condition of suretyship, and they are all necessarily and conclusively implied when one lawfully becomes a surety. These incidents must attach to the suretyship in this case, unless the statute which authorized it establishes and defines a difference between it and the contracts of ordinary sureties. One clause of the section which we have quoted was the subject of a good deal of comment in the argument. It is in these words: "And it shall be lawful for said company to stipulate and provide for indemnity from the parties aforesaid for whom it shall so become responsible, and to enforce any bond, contract, agreement, pledge or other security made or given for that purpose." It is one of the valuable rights of a surety that he may recover indemnity from his principal for any loss sustained by his defalcation or dereliction. From the nature and justice of the case the law conclusively infers a contract on the part of the principal that he will save his surety harmless. The clause in question gives this corporation the means of fortifying this implied contract, and making it more effective, by conferring the power to exact security for its performance. Everything which is expressed indicates the granting of a privilege, and we may say a privilege reasonable and proper. Its

exercise could do wrong to no one, and might become necessary for protection against great injustice. There is no indication of a purpose to withhold or abridge any right whatsoever. The general statute gives the surety of an administrator the right to obtain from the orphans' court an order that the principal shall give counter security. Now, it would be very unreasonable to hold that this right is constructively annulled by the grant of a privilege which shows on its face merely the ostensible purpose of protecting a surety against wrong and injustice at the hands of his principal. It would produce this very singular and anomalous result: that a grant of power to a corporation intended to furnish it with the means of protection from loss would, by legal construction, operate so as to prohibit it from seeking in a court of justice an ordinary remedy prescribed for the prevention of wrongs. We are of opinion that the statute of 1890 (chapter 263) does not deny to this corporation the rights belonging to other sureties, and we shall therefore affirm the decree of the orphans' court.

Affirmed, with costs.

AMERICAN SURETY COMPANY v. THURBER. 1900.

162 N. Y. 244; 56 N. E. Rep. 631.

Appeal from supreme court, appellate division, Second department.

VANN, J. This proceeding was commenced by an application made by the American Surety Company of New York, under section 812 of the Code of Civil Procedure, to be released as surety upon the bond of Fannie C. Thurber, the committee of Edmund G. Thurber, an incompetent person. In October, 1897, Edmund G. Thurber was adjudged a lunatic, and Fannie C. Thurber was appointed his committee, upon giving a bond in the usual form, in the penalty of $50,000. The bond was given on the 20th of August, 1898; the American Surety Company signing the same as surety in consideration of $50 paid down by Mrs. Thurber, and the agreement to pay $25 a year annually thereafter while the bond was in force. Before signing the bond the surety company accepted a contract from Mrs. Thurber, whereby she agreed, among other things, to hold

the company harmless, notify it of suits, and deposit any moneys coming into her hands in an accredited trust company; the same to be withdrawn only upon checks signed by her as committee, and countersigned by the surety company or its representative. It was also provided that "this agreement shall not, nor shall acceptance by the surety of payment for its suretyship, nor agreement to accept, nor acceptance by it at any time, of other security, in any way abridge, defer, or limit its right to be subrogated to any right or remedy, or limit or abridge any right or remedy, which the surety otherwise might or may have, acquire, exercise, or enforce." In February, 1899, while the bond was still in force, an order was granted, upon the petition of the company, requiring Mrs. Thurber to show cause why she should not furnish new sureties, and render an account as committee, or be removed from that position. She tried to show cause by presenting an affidavit establishing perfect regularity of procedure on her part as committee, and alleging that the company was acting through ulterior motives induced by the lunatic's relatives, who had refused to recognize her as his wife, or their child as his legitimate son. She charged that their object was to prevent her from prosecuting certain actions to set aside contracts made by the lunatic, in which one of their number was interested. She made out a strong case of hardship and injustice, which would have authorized the court, if its power is discretionary, to exercise its discretion by denying the motion. The special term denied the application upon the ground that section 812 of the Code was not intended to apply to the case of a surety for consideration, as distinguished from a gratuitous surety. Among the recitals of the order, as finally entered, is the statement that the company, on the argument of the motion, offered to return to Mrs. Thurber the premium paid by her. The appellate division stated in its order of affirmance that it was "made upon the ground that the provisions of section 812 of the Code of Civil Procedure, providing for the release or discharge of sureties from further liability, or liability for a subsequent act or default of the principal, do not apply to this case; the surety here being a corporation organized for surety purposes, and having become surety herein for compensation, and pursuant to a contract appearing on the record." As it appears in the order appealed from that the determination of the appellate

division was based on a want of power to grant the application, a question of law is presented which it is our duty to review even if the courts below might have denied the application in the exercise of discretion. Tolman v. Railroad Co., 92 N. Y. 354. The order states, in effect, that the court simply decided the question of power, without considering the question of discretion. The power of the court depends on the construction of section 812 of the Code of Civil Procedure, which occurs in an article entitled, "General Regulations Respecting Bonds and Undertakings." It is provided by section 810, which is the beginning of the article, that a bond or undertaking given in an action or special proceeding must be acknowledged or proved and certified in like manner as a deed to be recorded. Section 811 provides, among other things, that "the execution of any such bond or undertaking by any fidelity or surety company authorized by the law of this state to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties, and such company, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies." Section 812 requires the bond to be joint and several in form, where two or more persons execute it, and "except when executed by a fidelity or surety company, or when otherwise expressly prescribed by law, it must be accompanied with the affidavit of each surety" as to his qualifications. After making other regulations relating to the subject, the section further provides that "the surety or sureties, or the representatives of any surety or sureties upon the bond of any trustee, committee * * * or other fiduciary may present a petition to the court or judge that accepted such bond, praying to be relieved from further liability as such surety or sureties for the act or omission of the principal named in such bond occurring after the date of the order relieving such surety or sureties hereinafter provided for and that such principal be required to show cause why he should not account and give new sureties. Thereupon the court or judge must issue an order to show cause accordingly and may restrain such principal from acting, except to preserve the trust estate until further order. Upon the return of the order so issued, if the principal in the bond file a new bond in the usual form to the satisfaction of the court or judge within such reasonable time, not exceeding

five days, as the court or judge fixes, the court or judge must make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order and to file such account within a time fixed not exceeding twenty days and releasing the surety or sureties petitioning from liability upon the bond for any subsequent act or default of the principal. If the principal fails so to file such bond within the time specified, a decree must be made revoking the appointment of such principal and requiring him to so account, and file such account within twenty days. After the filing of an account as required in this section, the court or judge must, upon the petition of the surety or sureties, or the representatives of such surety or sureties, issue an order requiring all persons interested in the estate or trust funds, to attend a settlement of such account at a time and place therein specified, and upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability upon such bond."

The argument in support of the position taken by the courts below is that while the general words "surety or sureties" are broad enough to embrace surety companies, as the legislature, when referring to such a company elsewhere in the section or the one preceding, named it in terms, and did not so name it in the provisions authorizing the court to relieve a surety from further liability, it is presumed that there was no intention to give such a surety the right to apply for such relief. That part of the Code of Civil Procedure which went into effect on the 1st of September, 1877, embraced sections 811 and 812, which then contained no authority to surety companies to sign bonds or undertakings, and no provision authorizing any surety to apply for the relief now authorized by the latter section. Laws 1877, c. 318. In 1881 an act was passed authorizing the acceptance of certain corporations as sureties upon bonds and undertakings required or allowed by law, and in 1893 another act was passed of the same character, with more elaborate provisions. Laws 1881, c. 486; Laws 1893, c. 720. In 1886 section 811 of the Code was so amended as to authorize the execution of bonds or undertakings by fidelity or surety companies authorized to transact business in this state. Laws 1886, c. 416. In 1892 section 812 was amended so as to authorize

sureties upon certain official bonds to petition for release from liability, and this is the first appearance of any provision upon that subject in the Code which we have been able to discover. Laws 1892, c. 568. In 1895 said section was further amended by inserting in the earlier part thereof the provisions relating to fidelity and surety companies, which now appear therein. Laws 1895, c. 511. At this time surety companies had been doing business throughout the state for a number of years, as the legislature, from its own action, is presumed to have known. When, therefore, it inserted a general provision relating to fidelity and surety companies in the earlier part of the section, if it had intended to except such companies from the provisions of the latter part, applying to sureties generally, the presumption is that it would have said so in terms. It cannot be presumed that when amending the forepart of the section its members failed to read the remainder, or to comprehend the effect of the amendment upon the section as a whole. It allowed the general language, which theretofore had included all sureties authorized to sign bonds given in judicial proceedings, to remain after the section was so extended as to include fidelity and surety companies. As they are expressly named in one part, and named generally in another, with no exception or qualification, there is no adequate reason to believe that the legislature intended to exclude them from any part. There was no necessity for repeating the words "fidelity or surety companies" in order to make the section, as an entirety, apply to them; for they had already been named and were necessarily included, unless expressly excepted. As the legislature did not make any exception, we cannot, for there is no basis for an exception by implication. The section refers to any surety or sureties, and the appellant is a surety. Having contracted as a surety in the manner authorized by the Code, it can avail itself of such remedies as the Code provides for sureties generally.

Surety companies are a convenience to the community, and it is important that they should continue sound and able to respond to their obligations. The legislature doubtless intended to promote their stability by extending the same protection to them that it extends to other sureties. The contracts of such companies are usually based upon an annual premium for a continuing bond. If the premium were not paid after the first

year, and the company could not avail itself of the privilege of the statute, its responsibility would continue with no compensation, for the bond would still be in force. No company can do business on such a basis. Moreover, if the annual premiums are paid, but the principal is squandering the estate, how can a surety company protect itself? Through its officers it may inform those interested, and request action on their part; but if they reply, "you are good, and we are safe," what relief is there, unless it is under this section? If it cannot induce those ultimately entitled to the money or property to act, its condition is hopeless, and bankruptcy may be the result. These considerations, and others of like character, may well have influenced the action of the legislature when it amended the section under consideration. The provisions of the statute authorizing the company to become a surety are part of the contract of suretyship, and were not waived by accepting the contract of indemnity, which expressly provides that acceptance of security or consideration should not "limit or abridge any right or remedy which the surety otherwise might have." We think, therefore, that the courts below fell into error when they held that section 812 did not apply to this case, and declined to pass upon any other question.

The appellant claims that the provisions of the section are mandatory, as the words "must" ordinarily excludes discretion. That word, however, is occasionally used in the Code without the imperative meaning which it usually has. Spears v. Mayor, etc., 72 N. Y. 442; Wallace v. Feely, 61 How. Prac. 225, affirmed in 88 N. Y. 646. The provision requiring the court to "issue an order to show cause" implies that cause may be shown. It is more than a substitute for a notice of motion, for it is a specific requirement in a statute creating a special remedy, of which it is a part. There is no reason why the principal should be required to show cause, if no cause can be shown under any circumstances. When all the provisions of the section are read together, we think the court has a discretion to exercise, depending on the facts of the case, and is not commanded to make a decree regardless of those facts. In other words, we construe the expression "a decree must be made," under the circumstances, to mean "a decree may be made"; and hence the special term had a discretion to exercise in the first instance, and the appellate division by way of re-

view. Neither court, however, exercised its discretion or considered the subject, because both held that section 812 did not apply to a surety company. The application of the company, therefore, has not yet been fully passed upon, so we are compelled to reverse the order appealed from, and remit the proceeding to the appellate division for further action.

PARKER, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, and LANDON, JJ., concur.

Order reversed, etc.

BANK OF TARBORO v. FIDELITY & DEPOSIT CO.
1901.

128 N. C. 366; 38 S. E. Rep. 908; 83 Am. St. Rep. 682.

Appeal from superior court, Edgecombe county; Coble, Judge.

DOUGLAS, J. This case has been here before, and is reported in 126 N. C. 320, 35 S. E. 588. As far as that decision goes, it will be considered as final in the determination of this case. The following are the issues as submitted and answered: "(1) Did Mehegan, as cashier, and while in the performance of the duties of his office, between December 15, 1895, and September 3, 1897, fraudulently take from the assets and money of plaintiff bank the sum of $5,000, and on May 27, 1897, for the purpose of concealing his fraudulent conduct, charge said amount to the City National Bank of Norfolk on the books of plaintiff bank? Ans. Yes. (2) Did the defendant, Mehegan, between December 15, 1896, and September 3, 1897, as cashier, fraudulently take from the assets of the plaintiff bank a sum of money by means of overdraft on said bank aggregating $1,000 and more? Ans. Yes. (3) Did the defendant, Mehegan, between December 15, 1895, and September 3, 1897, as cashier, fraudulently take from the assets and money of said bank the sum of $9,550, or other amount, and by false entries on the books of said bank conceal the same from the plaintiff bank? Ans. Yes. (4) Did the defendant, Mehegan, as cashier, between May 12, 1897, and August 6, 1897, fraudulently take from the money and assets of said bank the sum of $5,000, which he concealed by making false entries in the books of said bank?

Ans. Yes. (5) Did the defendant, Mehegan, between December 15, 1895, and September 3, 1897, as cashier, fraudulently take money and assets of the bank, and convert the same to his own use? Ans. Yes. (6) Did the defendant, from September, 1896, to September 1, 1897, as cashier, fraudulently take from the money and assets of the said bank the sum of $452.21, which he applied to his own use? Ans. Yes. (7) Did the defendant, Mehegan, as cashier, on the 3d of August, 1897, fraudulently issue a cashier's check on the said bank to J. M. Norfleet to the amount of $600 for the purpose of paying an individual indebtedness of said Mehegan? Ans. Yes. (8) Did the defendant, Mehegan, fraudulently discount notes and bills, and pay for the same with money of the bank, without the knowledge and assent of the proper committees? Ans. Yes. (9) Did the plaintiff notify the defendant Fidelity & Deposit Company of the alleged default of the said J. G. Mehegan as required by the bond? Ans. Yes. (10) Did the plaintiff, after the execution of the surety contract, increase its capital stock? Ans. Yes. [This was answered by the jury "Yes," in April, 1896.] (11) Were the representations in the certificate for the renewal of the surety bond as to the dealings and accounts of the said Mehegan, cashier, true and correct when they were made? Ans. Yes. (12) Were such representations as to the dealings and accounts of the said Mehegan, cashier, on the said certificate, false to the knowledge of the plaintiff at the time they were made? Ans. No. (13) Did said representations constitute a material inducement of the defendant company to continue said bond from December 15, 1896, to December 15, 1897? Ans. No. (14) Did the plaintiff cause to be observed due and customary supervision over said Mehegan, cashier, for prevention of default? Ans. Yes. (15) Did the Fidelity & Deposit Company have notice of the increase of the capital stock before the extension of the bond? Ans. Yes."

The defendant assigns for error: "(1) That the court erred in admitting the written statement as excepted to. (2) For error in instructing the jury as set out in the charge to the jury. (3) In that instructions are inconsistent, contradictory, and misleading. (4) In the construction of the meaning of the words 'immediately notified.' (5) In instructing the jury that the same supervision and duty required of the officers

of the plaintiff bank over the management of the affairs of the bank was such care, supervision, and duty as the ordinary prudent business man would give. (6) For refusing to instruct the jury as requested in the several prayers submitted by the defendant."

The first assignment of error cannot be sustained. The admitted paper was a memorandum of the examination of the defendant, Mehegan, before a committee of the board of directors of the plaintiff bank, and taken down by the witness Davis, who testified as follows: "Mehegan was present before the committee. He was examined. His examination was put in writing,—was recorded at the time in writing. I read every sentence to Mehegan as Mr. Fountain propounded the questions. Then I wrote down Mehegan's answer. I read the questions and answers as they were made, and he said that they were correct. The entire paper is in my handwriting. Then read the whole over to Mehegan. He never refused to sign; never was asked to sign it." Under such circumstances we think the paper was admissible as part of the testimony of Davis, with whose credibility, of course, its own was involved. Bryan v. Moring, 94 N. C. 687; State v. Pierce, 91 N. C. 606; State v. Jordan, 110 N. C. 491, 495, 14 S. E. 752.

We do not think that either the second or third assignments can be sustained. The judge's charge extends through 15 pages of the printed record, and is full, clear, and explicit, and, we think, free from substantial error. Many of the points raised by the defendant come under the principles decided when the case was first before us. We then said (126 N. C. 324, 35 S. E. 589): "The object of the contract was to secure the plaintiff against the fraudulent acts of its cashier. The complaint alleges the execution of the bond and its renewal, and sets out their substantial features, the alleged fraudulent acts of the cashier, and notice to the defendant company. These facts being proved would have made out the plaintiff's case. Nothing else appearing, the plaintiff would have been entitled to recover, and, if the defendant company relied upon breaches of the contract on the part of the plaintiff to defeat a recovery, it should have specifically pleaded them. The burden of proving them would have rested upon the defendant. To require the plaintiff to set out each and all of the fifty conditions and stipulations in the bond and application, and then prove affirm-

atively that he had performed each one of them, would practically defeat any recovery, and would amount to a denial of justice." That is now the law of this case, and our opinion of its correctness has been confirmed by subsequent investigation and further reflection. The object of an indemnifying bond is to indemnify; and, if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as an actual security, and misleading as a pretended one. The defendant lays great stress upon section 5, c. 300, Laws 1893, which is as follows: Any company executing such bond, obligation or undertaking may be released from its liability as surety on the same terms as are or may be by law prescribed for the release of individuals upon any such bond, obligation or undertaking." It seems clear to us that the only object of that section was to enable such company to release its liability by getting off the bond whenever an individual could do so; but not to remain on the bond and limit its liability by such unreasonable restrictions as would practically amount to a release by tending to defeat a recovery. Moreover, that section says, "On the same terms as are or may be by law prescribed." Where are any such terms prescribed by law as those which appear in the bond before us, and which the defendant is so strenuously endeavoring to bring within the terms of that section? We are sure that act never intended to authorize trustees, guardians, or administrators to give bond with such stipulations construed as the defendant is now asking us to construe them. The defendant again insists that it should have the same right to limit its liability as is possessed by an individual. That may be, but no member of this court has ever seen or heard of a bond in such a form being tendered by a private surety. In its very form and essence, the bond before us resembles an insurance contract, and differs materially from the ordinary forms coming down to us by immemorial usage. Therefore we must place such bonds in the general class of insurance policies, and construe them upon the same general principles; that is, most strongly against the company, and most favorably to their general intent and essential purpose. Bank of Tarboro v. Fidelity & Deposit Co., 126 N. C. 320, 325, 35 S. E. 588; Surety Co. v. Panly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977. In the latter case, Justice HARLAN, speaking for a unanimous court,

says (on page 144, 170 U. S., page 556, 18 Sup. Ct., and page 981, 42 L. Ed.): "If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well established rule in the law of insurance. First Nat. Bank v. Hartford Fire Ins. Co., 95 U. S. 673, 24 L. Ed. 563; Insurance Co. v. Cooper, 32 Pa. St. 351, 355; Reynolds v. Insurance Co., 47 N. Y. 597, 604; Insurance Co. v. McConkey, 127 U. S. 61, 666, 8 Sup. Ct. 1360, 32 L. Ed. 308; Fowkes v. Association, 3 Best & S. 917, 925. As said by Lord St. Leonards in Anderson v. Fitzgerald, 4 H. L. Cas. 484, 507: 'It [a life policy] is, of course, prepared by the company, and if, therefore, there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it.' There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which, in the employer's service, he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank." To the same effect are the cases of Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; London Assurance v. Compania De Moagens Do Barreiro, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113; Horton v. Insurance Co., 122 N. C. 498, 29 S. E. 944; Grabbs v. Ins. Co., 125 N. C. 389, 398, 34 S. E. 503, and cases therein cited. The same principle of construction has been applied to the contracts of common carriers. Wood v. Railway Co., 118 N. C. 1056, 1063, 24 S. E. 704; Mitchell v. Railroad Co., 124 N. C. 236, 32 S. E. 671; Jeffreys v. Railway Co., 127 N. C. 377, 37 S. E. 515; Hinkle v. Railway Co., 126 N. C. 932, 36 S. E. 348. The defendant has voluntarily become, by virtue of the statute, what may be called a "common surety"; not exactly in the

nature of a common carrier, like railroad and telegraph companies, but still one of those public agencies to which are given unusual powers, and which have assumed the most sacred responsibilities. Permitted by law to act as sole sureties for trustees, guardians, administrators, and other fiduciaries, they are held by the policy of the law to the full measure of the responsibility they have voluntarily assumed. They may make such reasonable regulations as are necessary for their own protection, or the proper transaction of their business; but such stipulations will be most strongly construed against a forfeiture of the indemnity for which alone the bond is given, and in favor of a fair and equitable construction of the essential purposes of the contract.

The fourth exception is equally untenable. On that point his honor charged as follows: "If you find from the testimony that the plaintiff bank, in a reasonable time, and with due diligence, under the circumstances, as explained in these instructions, and in view of all the facts in evidence, gave notice of the default of the said Mehegan, you should answer the ninth issue 'Yes.' The plaintiff was not required, by the terms of the bond, to give notice to defendant company upon suspicion that Mehegan was guilty of fraudulent conduct. The plaintiff was not required to give notice to the defendant company until it had actual knowledge of such facts as would justify the charge of default; and it was entitled to a reasonable time to investigate the condition of said Mehegan's accounts before it was required to give such notice, if such investigation was necessary to ascertain the facts which would justify the charge of fraud." In this we see no error. The plaintiff was not required to act upon mere suspicion in preferring so grave a charge as fraud or embezzlement. Moreover, reasoning from analogy to the rights of a guarantor, the defendant does not appear to have suffered any material injury from such delay, even if the plaintiff had been responsible for the delay, which the jury found to the contrary. But the defendant contends: "That, if the surety is 'immediately notified' of the defalcation, upon its discovery the surety would have an opportunity to deal with the defaulter, and secure some part, if not all, of its loss. This case proves at once the wisdom and justice of such a provision, for by not notifying the surety 'immediately' the plaintiff was enabled to get all the security the defaulting principal, the cashier,

could give, and the surety had no opportunity." The plaintiff had the right to resort to all the property of the defaulting cashier, whether he gave bond or not; and, if the defendant means to contend that by signing the cashier's bond as surety it acquired a right of reimbursement superior to that of the bank, we can only say that it does not so appear to us either from the terms of the bond or the general principles of law.

The fifth assignment of error cannot be sustained, as we think the charge of his honor was correct. In fact, no other rule justly capable of practical application suggests itself to us.

The sixth exception is equally untenable. The defendant submitted 12 special instructions, occupying five pages of the printed record. It is useless, as well as impracticable, to consider each in detail. All we need now say, in addition to what has already been said, is that they were all properly refused either for intrinsic error or because sufficiently given in his honor's charge. In the absence of substantial error, the judgment of the court below is *affirmed.*

CHAPTER XXIV.

MEASURE OF DAMAGES.

a. The measure of damages in guaranty insurance is the actual loss arising from the peril insured against, up to the amount of the policy.

GERMAN-AMERICAN TITLE & TRUST CO. v. CITIZENS' TRUST & SURETY CO. 1899.

190 Pa. St. 247; 42 Atl. Rep. 682.

Appeal from court of common pleas, Philadelphia county.

FELL, J. The defendant agreed to insure the plaintiff against actual loss which might result to it, as a purchaser of ground rents upon unimproved land, by reason of the noncompletion of buildings to be erected thereon by P. P. Elkinton. No policy was issued, but the settlement certificate was treated by both parties as a complete agreement. By the terms of this certi-

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ficate a policy for $30,000, insuring the plaintiff against actual loss by reason of the noncompletion of 42 buildings prior to January 1, 1894, in accordance with an agreement between Elkinton and the assured, dated January 17, 1893, was to be issued when the transaction was settled and the deeds recorded. The agreement of January 17, 1893, referred to, provided for the sale of the ground rents, the construction of the buildings, the manner of payment, and for a resale of the ground rents to Elkinton, at his option, upon certain terms. This agreement was signed by Elkinton only, but it was accepted and acted upon by the plaintiff, and the provisions binding the plaintiff were fully carried out. The plaintiff advanced $116,000, the buildings were not completed, and the plaintiff's actual loss was largely in excess of the amount of the insurance. In September, 1893, Elkinton, without the assent or knowledge of the plaintiff, assigned his contract to Goodchild, and soon afterwards the work on the buildings stopped. Subsequently Elkinton claimed that the assignment had been procured from him by fraud. He filed a bill in equity, and obtained a special injunction, which was afterwards dissolved. The bill, however, was proceeded with, and the controversy was not closed for several months thereafter. A balance due by the plaintiffs was claimed by Elkinton, by Goodchild, and by the defendant. Negotiations for the adjustment of the difficulties which had arisen, and for the completion of the work, were pending for some time, but were finally abandoned, and the ultimate loss to the plaintiff was $48,000.

Two of the defendant's contentions at the trial—(1) that the agreement dated January 13, 1893, was not executed until after May 20th, the date of the settlement certificate, and (2) that the plaintiff, after the assignment by Elkinton, unjustifiably refused to pay to Goodchild or to the defendant—depended on the facts proved, and they were decided by the jury adversely to the defendant. We see no ground for a just criticism of the manner in which the questions of fact were submitted, or of the statement of the law applicable thereto.

It remains to consider whether the failure of the plaintiff to sign the agreement entered into with Elkinton precluded it from recovering on the contract of insurance with the defendant, and whether the proper rule for measuring the damages was given the jury. It was contended by the defendant that, as the agree-

ment of January 17, 1893, related to the purchase and sale of real estate, and was not signed by the plaintiff, and not ratified by writing, it was invalid, and could not have been enforced by Elkinton, or by his surety, in case of subrogation to his rights; and that the defendant's contract of insurance, which was based upon this agreement, was not binding upon it. What Elkinton agreed with the plaintiff to do was to convey to it the ground rents, to build on the ground so as to secure the rents, and to furnish the bond of a trust company guarantying the completion of the buildings in accordance with plans to be approved by the plaintiff. In pursuance of this agreement he procured the defendant's contract to insure the completion of the buildings, made the conveyances, and received the purchase money. If a policy had been issued, it would not have taken effect until the conveyance was made. The insurance related to what remained to be done after the conveyance, the completion of the buildings, and to that part only of Elkinton's agreement. It was not an insurance that he would convey, but that, after conveying, he would build. It did not cover any obligation on the part of the plaintiff, but the obligation of Elkinton only, as fixed by a then existing agreement between him and the plaintiff.

We find no error in the statement of the rule for the measure of damages. The jury were limited to the actual loss in the value of the ground rents, not exceeding the amount of the insurance, and were instructed that that loss would be represented by the difference in the market value of the ground rents if the buildings had been completed as provided by the agreement and their value with the buildings in the uncompleted state in which they were left. We know of no better rule than this in such a case, and of none more just or favorable to the defendant. A sale of ground rents issuing out of land on which were uncompleted buildings would furnish a very unsatisfactory and inconclusive test of their value. A sale would be one means of fixing a value with the buildings unfinished, but the ground rents, if not well secured, even with completed buildings, would have been worth less than par. The plaintiff was under no duty to take the chance of a greater loss by exposing its property to sale with the buildings unfinished.

The judgment is affirmed.

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